Central Law Journal.

ST. LOUIS, MO., AUGUST 18, 1899.

Notwithstanding the many rebukes administered by appellate courts to trial judges for the giving of instructions calculated to force unduly the agreement of jurors, the number of those so erring does not seem to diminish. An Oregon *nisi prius* judge is the latest offender, as we learn from the case of State v. Ivanhoe, decided by the Supreme Court of Oregon. There it appeared that on a trial for assault with intent to kill, the jury having reported their disagreement, the court instructed them that a great deal of time had been taken up, and, if they did not agree, the case would have to be tried by another jury, who could not arrive at a verdict any better than they could; that it was their duty to agree, if they conscientiously could; that they should pay proper respect to the opinions of each other; that the single object to be effected was to arrive at a true verdict, which could only be done by deliberation and mutual concessions; that no juror should violate his conscience, but, in determining whether his convictions were sustained, he should consider the opinions of the other jurors, and, if he could then conscientiously acquiesce in a verdict, it was his duty to do so. The jury retired and returned a verdict of conviction. It was held that the instruction was erroneous and prejudicial to accused.

The legal *status* of the offspring of slave marriages is considered by the Supreme Court of Florida, in the case of Adams v. Sneed. It has generally been held that the issue of slave marriages, in the absence of enabling statutes, possesses no inheritable blood. An exception to this generally uniform ruling is to be noted in the case of Tennessee, where customary slave marriages with the master's consent, though never authorized or regulated by statute, were recognized as valid by the courts, and the issue regarded as legitimate. But the Tennessee decisions have not been followed by any other court, the authorities being in harmony with the decision of the Florida court above referred to. Then, after an interesting review of the cases, it was held that in the absence of enabling statutes, the issue of customary slave marriages, which terminated before, or were never ratified by the parties thereto after, emancipation, possesses no inheritable blood, under our statutes of descent; that general emancipation was not retroactive, so as to infuse inheritable blood into those who did not possess it before emancipation; nor did it render valid customary slave marriages contracted before, but not ratified or confirmed after, emancipation; nor does general emancipation authorize the courts to place the children of customary slave marriages, which terminated before, or were never ratified by the parties after, emancipation, upon the plane of the legitimate issue of legal marriages, within the meaning of statutes of descent; and that children of customary slave marriages, which terminated before, or were never ratified by the parties thereto after, emancipation, are neither legitimates nor bastards, within the meaning of our statutes of descent; they simply have no *status* one way or the other. The case of Williams v. Kimball, 35 Fla. 49, 16 South. Rep. 783, in so far as it holds that such children are placed in the same category as bastards, and that it is proper to give them the benefit of any legislation adding to the inheritable capacity of bastards, was overruled.

A recent decision by the United States Court of Appeals for the Second Circuit presents the interesting question, whether the incapacity to contract as a result of the law of a person's domicile attaches to his contractual acts in another State, where the incapacity does not exist. First National Bank v. Mitchell. It seems that the Supreme Court of Connecticut arrived at an opposite conclusion in a suit brought upon the same contract and between the same parties. Freeman's Appeal, 68 Conn. 533. The case in the federal court was this: Mrs. Mitchell delivered her guaranty of her husband's debt to him in Connecticut, with knowledge that he would transmit it to the First National Bank of Chicago. This made it an Illinois contract, as conceded by the Connecticut Supreme Court, yet that court held that the Illinois delivery was done under an agency contributed in Connecticut, and therefore the law of that State was held applicable. But the fed-

eral court held this reasoning ingenious, but not convincing, and reversed the circuit court decision, which had followed the State adjudication. In entering the reversal, Circuit Judge Wallace said: "We are extremely reluctant to differ with the Supreme Court of Connecticut in a case involving the same facts, between substantially the same parties, not only because the opinion of that learned tribunal is always entitled to great consideration, but also because it is, in a sense, unseemingly that there should be diverse judgments under such circumstances between a federal court sitting in that State and the highest court of the State. But the case is one which concerns the rights of a citizen of Illinois, acquired before the decision of the State court; and its decision depends, not upon the construction of local laws, but upon the application of the principles of general jurisprudence. In such cases the federal courts are in duty bound to exercise their own independent judgment." Judge Lacombe dissented.

NOTES OF IMPORTANT DECISIONS.

DEED—CONVEYANCE OF FEE IN TRUST—LIMITATION OVER—VALIDITY.—The Supreme Court of Missouri, in Cornwall v. Wolff, 50 S. W. Rep. 439, after an exhaustive review of the authorities, reaches the conclusion that there can be no valid limitation of a remainder on the conveyance of a fee in trust. It appeared in this case that the granting clause of a trust deed conveyed to the trustee a fee to hold for the benefit of the *cestui que trust*, and the trustee covenanted, in addition to the performance of the trust during the lifetime of the *cestui que trust*, to convey on her death to her husband in default of other appointment by her. It was held that the voluntary covenant of the trustee to convey to the husband could not enlarge his powers, so as to defeat the trust imposed on him by the granting clause of the deed. Three of the members of the court dissent from the conclusion of the majority.

MUNICIPAL CORPORATION—ASSAULT BY SPECIAL POLICEMAN.—In Craig v. City of Charleston, 54 N. E. Rep. 184, decided by the Supreme Court of Illinois, it was held that a city is not liable for the wrongful act of its mayor in appointing, as special policeman, a person that he knows is unfit for the office. The court said: "The sufficiency of the declaration is the only question for our consideration. Stripped of their surplusage, the material averments of fact are that the City of Charleston, on an occasion when a large crowd of people had congregated in the city, appointed one John Apgar as an officer to prevent the obstruction of the streets by vehicles or otherwise, and placed him in control of one of the streets; that Apgar was a dangerous and violent man, and possessed an ungovernable temper and vicious disposition, which facts were known, or by the exercise of reasonable diligence, could have been known, to the appointing officer; that Apgar, while in charge of the street and under pretense of discharging his duty, made a brutal and unjustifiable assault upon the plaintiff with a stick, whereby the plaintiff lost one of his eyes and was otherwise injured. The duties devolving upon Apgar by virtue of his appointment were police duties. He was what is sometimes aptly termed a 'special policeman,' authorized to perform certain specific acts. It is a familiar rule of law, supported by a long line of well-considered cases, that a city, in the performance of its police regulations, cannot commit a wrong through its officers in such a way as to render it liable for tort.

"It is contended, however, that appellant does not base his right of recovery against the city upon the wrongful act of Apgar, merely, but upon the wrongful act of the mayor in appointing such a man as Apgar, when he knew, or should have known, of his dangerous and vicious character. The same principle which absolves the city from liability for Apgar's tortious act applies to the act of the mayor. The mayor was simply exercising a discretion vested in him by virtue of his office and the laws of the State. If the appointment was a wrongful act, which resulted in injury to the appellant, the burdens of liability cannot be cast upon the inhabitants and taxpayers of the city. A municipal corporation, while simply exercising its police powers, is not liable for the acts of its officers in the violation of the laws of the State and in excess of the legal powers of the city. Dill. Mun. Corp., §§ 950, 968; Town of Odell v. Schroeder, 58 Ill. 353; City of Chicago v. Turner, 80 Ill. 419; Wilcox v. City of Chicago, 107 Ill. 334; Blake v. City of Pontiac, 49 Ill. App. 543.

"Appellant further contends that the placing of Apgar in the street, and in control of it, was the creation of a nuisance, upon which ground it is liable—in fact, his chief contention is that he became thereby an obstruction in the street—and cites a long list of authorities in support of the proposition that it is the duty of a city to keep its streets free from obstructions, and a failure in that regard will render it liable for injuries caused thereby. We cannot regard a human being, in the exercise of police powers, as an obstruction, in the sense contemplated by the unquestioned doctrine announced by those cases. We think the court properly sustained the demurrer to the declaration."

MUNICIPAL CORPORATION—STREET GRADING—SURFACE WATER—DAMAGES.—It is held by the Supreme Court of California, in Lampe v. City

and County of San Francisco, that a city is not liable for damages caused by the obstruction of the flow of surface water from land abutting on a street, occasioned by the necessary and lawful grading of street. The court says:

"The complainnt after alleging that defendant is a municipal corporation, states that defendant in accordance with law established the official grade of Sanchez street, between Liberty and Twenty-first streets, and thereafter proceeded to fill and raise said Sanchez street about five feet above it natural and original grade, and about five feet above the natural level of plaintiff's lot, thus causing an embankment about five feet high in front of the lot of plaintiff. It is stated in said complaint: 'That by reason of said embankment so raised in said street, the natural flow of the surface and other waters from plaintiff's lot is impeded, and the waters from the premises above and adjoining plaintiff's said premises flow upon plaintiff's aforesaid lot; that by reason thereof the basement of plaintiff's said dwelling has become and remains damp and unwholesome, and the water does not flow off as freely as it had done prior to the grading of said street, but accumulates on plaintiff's said lot, and the healthfulness and comfort of said house and premises as a dwelling has been greatly impaired, to plaintiff's great injury and damage.' The complaint further alleges damage by reason of a sewer and foul odors therefrom. The demurrer was upon three grounds: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that it is ambiguous, uncertain, etc.; and third, that there is a misjoinder of causes of action united in the same count, and not separately stated. Counsel for appellant in their brief say that no damage is claimed and no relief is asked on account of the sewer, and that the allegations of the complaint as to the sewer may be treated as surplusage. We will, in discussing the case, adopt this view and thus the only question left is as to whether or not the complaint states facts sufficient to constitute a cause of action. The portion of the complaint before quoted is the material part. As we understand it, damages are claimed because of the grading of the street, which is the property of defendant, prevents the surface water from flowing off the lands of the plaintiff and onto the lands of defendant, as it had been wont to flow. The question is as to whether or not defendant is liable to damages caused by the obstruction of the flow of surface waters from the lands of plaintiff, occasioned by the necessary and lawful grading of defendant's street in front of plaintiff's said lands. Upon the solution of this question depends the result as to whether or not this judgment shall be affirmed.

"In 2 Dill. Mun. Corp. § 1039, the rule is stated: 'As to surface water, quite different principles apply. This the law very largely regards (as Lord Tenterden in an analogous case phrased it) as a common enemy, which every proprietor may fight or get rid of as best he may. The reports contain many instances in which it has been sought to make municipal corporations liable for damages caused in various ways by surface water to private property. Reference will first be made to cases in which the work of grading or improving the streets has been the cause of the injury. Where the damage has resulted solely as a consequence of the proper execution of a legal power by the corporation, it falls within the principles already discussed, and there is no implied liability therefor.' Section 1042: 'We agree to the doctrine that the municipality is not bound to protect from surface water those who may be so unfortunate as to own property below the level of the street.' The authority quoted is supported by a long line of decisions both in this country and in England. Gould, Waters, §§ 263, 269; Clark v. City of Wilmington, 5 Har. (Del.) 243; Waters v. Village of Bay View, 61 Wis. 642. 21 N. W. Rep. 811; Lynch v. Mayor, etc., 76 N. Y. 60. It was expressly so held by this court in Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. Rep. 798; Los Angeles Cemetery Assn. v. City of Los Angeles, 103 Cal. 467, 37 Pac. Rep. 375. In the latter case it is said: 'The doctrine of the civil law, in reference to a servitude in the lower tenement in favor of the upper or dominant tenement, for the flow of surface water, has no application to lots held in cities and towns, where changes and alterations in the surface were essential to the enjoyment of such lots, and this rule has been very generally adopted in this country.'

"There is in some of the books an apparent exception to the general rule in that class of cases where the surface water, owing to the conformation of the country, has found for itself a definite channel in which it is accustomed to flow, in which class of cases it is said that the municipal corporation in making an embankment while grading its streets should erect a culvert or waterway so as not to obstruct the flow of the surface waters in their well-defined channel; but the case under discussion is not one of that class. Counsel for appellant, with apparent confidence, in their brief say: 'That the complaint states facts sufficient to constitute a cause of action, is settled in Stanford v. City and County of San Francisco, 111 Cal. 198, 43 Pac. Rep. 605.' We have carefully examined that case, and find nothing in it in conflict with what is herein stated. The question in that case was as to whether or not the city was liable for damages caused by the accumulation of surface water which was the necessary consequence of paving the streets. It appeared that by reason of the grading of the street large quantities of surface water accumulated and broke over the curbing, and ran into the basement occupied by the plaintiff. In the opinion, after discussing the principle upon which the city was held liable, it is said: 'Nor is this case within that numerous class of cases where it is held with almost entire unanimity that a municipality is not bound to pro-

tect from surface water those who may be so unfortunate as to own property below the level o the street.' In this case there is no allegation that the grading of the street caused surface waters to accumulate in unusual quantities, and that such surface waters were turned upon the lands of plaintiff."

LIBEL — PUBLICATION — AUTHORIZATION — RATIFICATION.—In Russo v. Maresca, 43 Atl. Rep. 552, decided by the Supreme Court of Errors of Connecticut, it appeared that defendant, as president of a society, presided at a meeting whereat it was voted to cause an answer to a newspaper article reflecting on it to be published in a desgnated newspaper, and a sum of money was appropriated to pay therefor. One of the members of the society was designated to write it, and defendant, after the meeting, saw the editor of the newspaper in which it was to be published, and informed him of the action of the meeting. Defendant did not know or contemplate that the answer would contain any improper or libelous matter. The person writing the answer, which proved libelous, signed defendant's name as president of the society, and it was so published. It was held that defendant was not responsible for the publication.

It further appeared that defendant, after the publication of a libelous article to which his name was signed as president of a society, and with knowledge of its contents, as president of the society signed an order on the treasurer in payment for the publication. It was held not to constitute a ratification, as the publisher and writer did not purport to act for defendant, but for the society. The court said in part:

"In the court below it seems to have been assumed by all concerned that the article complained of constituted a libel, and, for the purposes of the present discussion, this assumption will be regarded as correct. The important question in the case is whether or not the defendant is responsible for libel. Upon the facts found, the plaintiff claimed, in effect (1), that the defendant, by his conduct before the publication of the libel, had so authorized or participated in its publication as to be responsible for it. (2) That, by his conduct after publication, he had become responsible for it by ratification. The finding of the court is conclusive against the first claim. Upon this part of the case it must be remembered that the person who wrote and the person who published the libel were in doing these things the agents, not of the defendant, but of the society Concordia. The finding, based, so far as appears, upon competent and sufficient evidence, is to the effect that the defendant did not in any way authorize nor take part in the preparation or publication of the libel. The society of which the defendant was president, at a regular meeting, over which he presided, voted to cause an answer to a certain newspaper article to be published in a designated newspaper, and to pay for such publication the sum of $5, which was then appropriated for that purpose, and that one of its members designated should write the answer. At this time the answer had not been prepared, and no one contemplated that it was to contain any improper or libelous matter. Immediately after the meeting the defendant, in company with other members of the society, saw the editor of the newspaper in which the answer was to be printed, and informed him of the action of the meeting. These two acts—namely: presiding at said meeting, and informing the editor of the action of the meeting—comprise all that the defendant did prior to the publication of the libel.

"The claim of the plaintiff on this part of the case seems to be that, these two things being true, then, as matter of law, the defendant authorized and participated in the publication of the libel. This claim is not well founded. The court has properly found, as matter of fact, that the defendant had no share in writing the answer, was not consulted about it, had no knowledge of its contents, and no expectation that it was to contain libelous matter, or any attack upon the plaintiff. This being so, the two further facts found as aforesaid do not of themselves and, as matter of law, show that the defendant authorized or participated in the publication of the libel. After the libel was published, and after the defendant had full knowledge of its nature and character, he, as president of the society, with others of its officers, signed an order upon the treasurer of the society in payment for the publication of the libel. The plaintiff claimed that this act amounted, in law, to a ratification on the part of the defendant, and made him responsible for the publication of the libel; and the remaining question in the case is whether this claim is well founded. Where one person does any act on behalf of another person, the subsequent ratification by such other person of such act is, in law, equivalent to his having previously authorized it. That the principle of ratification applies to torts, as well as to contracts and other acts and transactions, is well settled; the general rule being that the principal may ratify any act which he could have authorized. 'An act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him. In such case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority.' Wilson v. Tumman, 6 Mad. & G. 242; Hilberry v. Hatton, 2 Hurl. & C. 822; Tempsey v. Chambers, 154 Mass. 330, 28 N. E. Rep. 279; Moorehouse v. Northrop, 33 Conn. 380, 389. But an act or transaction can only be ratified by the person on whose behalf it was assumed to be done or entered into. If A assumes to do an act on his own behalf, or on behalf of B

the act cannot be ratified by C. The rule is stated by Lord Coke, in 4 Inst. 317, as follows: 'He that receiveth a trespasser, and agreeth to a trespass after it be done, is no trespasser, unless the trespass was done to his use or for his benefit; and that his agreement subsequent amounteth to a commandment; for, in that case, '*Omnis ratihibitio retrotrahitur et mandato æquiparatur.*'" Where A knowingly received from B a chattel which B had wrongfully seized, and A afterwards refused to give it up, it was held that A did not thereby become a joint trespasser with B, unless the chattel was seized to A's use. A, in doing what he did, may have committed another tort, but did not make himself liable for B's tort. Wilson v. Barker, 4 Barn. & Adol. 614. Where a colonel of a volunteer corps made a contract professedly on behalf of the corps, both he and the other contracting party erroneously thinking that the corps, as an entity, might be bound, it was held that the contract could not be ratified by individual members of the corps, because it was not made on their behalf as individuals. Jones v. Hope, 3 Times Law R. 247, note. See, also, to the same effect, Wilson v. Tumman, *supra;* Hamlin v. Sears, 82 N. Y. 327; Western Pub. House v. District Tp. of Rock, 84 Iowa, 101, 50 N. W. Rep. 551; Richardson v. Payne, 114 Mass. 429; Smith v. Lozo, 42 Mich. 6, 3 N. W. Rep. 227; Grund v. Van Vleck, 69 Ill. 478; Cooley, Torts, 127. The well-settled rule, then, is that, if A professes to act for B in what he does, C cannot by an attempted ratification take advantage of the act done, nor can he ratify it so as to become liable on it. Applying this rule in the case at bar, the defendant could not ratify the act of Dr. D'Elia in preparing the libel, nor of the editor in publishing it. In what they did, neither of them acted on behalf of the defendant, nor did they profess to do so. In all they did concerning the libel they acted and professed to act only for the Concordia Society. If what they did had resulted in great benefit to the society, it is clear that the defendant could not by any attempted ratification have taken that benefit to himself; and it is equally clear that he cannot, by what he did, make himself liable for the burden which their act may have cast upon the society and themselves.

DIVORCE—ALIMONY.—The Supreme Court of California decides, in Hite v. Hite, 57 Pac. Rep. 227, that in an action for divorce, brought by a wife, where the marriage is denied, to entitle her to alimony and suit money she must prove it by a preponderance of the evidence; a mere *prima facie* showing is not sufficient. Two of the members of the court dissent. The court says in part:

"And this, I think, is really the question in the case: Was it sufficient, to entitle the plaintiff to alimony and suit money, for her to make by her own showing a *prima facie* case? I believe there is no authority for that position. If the marriage were admitted, then, upon a showing of the wife's necessities and the faculties of the husband, the allowance is almost a matter of course. It is otherwise when the marriage is denied. Then, before alimony can be allowed, the marriage must be proved; and a *prima facie* showing made by the wife when there is a counter showing is not sufficient. The judge should be satisfied from the entire proof made of the fact of marriage. Unless upon that question the husband has had his day in court, and a hearing, if alimony is allowed, his property is taken without due process of law. This precise question has not been considered, or even suggested, in any case to which my attention has been called, except in McKenna v. McKenna, 70 Ill. App. 340. It was there said that in such case—when the marriage is denied—the order cannot properly be made 'until a hearing has been had, and the court upon it finds that the relation of wife and husband exists.' The hardships which might result from either doctrine is there very tersely stated. The learned judge quotes from Schonwald v. Schonwald, 62 N. Car. 219, to the effect that it is better when a woman makes oath of the fact of marriage to make an allowance, although the oath may turn out to be false, than that a wife may be in danger of starvation 'if a brutal husband makes oath denying the marriage, which may turn out to be false;' to which the Illinois judge replies that 'the more accurate statement would be that it is better to compel any man to pay temporary alimony and expenses of suit to any woman who may see fit to make oath that he is her husband, however strongly he may deny the allegation, rather than to allow her to be in want of money which he has.' Whatever hardships may result, the court cannot lawfully take by final decree money from A and give it to B, whatever may be the necessities of B, when A disputes the facts upon which his liability is made to depend, without a trial and a determination of the issues made. The hardship to B cannot modify the imperative rule of law and the absolute constitutional guaranty. It is not such a trial, and there can be no such finding, when a man is merely called into court to see whether one claiming to be his wife has in her pleadings and affidavits made a *prima facie* case. He must be heard, and be allowed to submit evidence, which must be considered in determining as to the fact of marriage. But that opportunity need not be on the trial of the case itself. The application for alimony, though it cannot be considered a separate suit, is a proceeding for a separate judgment, which, when granted, has nothing to do with the final judgment in the case, and will not be affected by it. It is a final judgment, from which an appeal may be taken. Sharon v. Sharon, 75 Cal. 1, 16 Pac. Rep. 345.

"To satisfy the requirement of due process of law it is not always necessary that such a trial should be afforded as is had in ordinary suits in courts of justice. The hearing allowed must be such as is practicable and reasonable in the particular case. Cooley, Const. Lim. 434. See, also, *Ex parte* Ah Fook, 49 Cal. 406; Lent v. Tillson,

72 Cal. 404, 14 Pac. Rep. 71. Cooley says the opportunity to be heard must be such as 'the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.' It has been the practice to determine, as to the allowance of temporary alimony, upon motion with notice and upon affidavits. The defendant is thereby afforded an opportunity to be heard. Many cases are cited by respondent's counsel which he contends hold that all that is required on the part of the wife to justify an allowance of alimony, is that she, by her showing, shall make such a case as upon a trial of the issue would cast the burden upon the husband. It is not necessary to review all the cases, but the case of Brinkley v. Brinkley, 50 N. Y. 184, is much relied upon, and concerning it a few remarks may be made. That case has some likeness to this. A contract marriage was alleged, with subsequent cohabitation. The wife alleged that defendant on many specified occasions introduced her as his wife, that they were received as husband and wife by reputable acquaintances, and such was their common reputation. The husband denied the marriage, and that he had by word or act at any time or place given the least foundation for the supposition or charge that plaintiff was his wife. He denied that their cohabitation was matrimonial, but averred that plaintiff was of unchaste character and person, and her relation with defendant was libidinous, and unsanctioned by law. In other words, he admitted the cohabitation, but claimed that it was meretricious from the beginning. Judge Folger did not say that this was not a denial of a fact essential to constitute marriage, but the contrary. Cohabitation, and holding out to the world that the persons so cohabiting are married, and general reputation, though all admitted, do not of themselves constitute marriage. But they authorize the presumption of the other fact, to-wit, that the cohabitation was with matrimonial intent.

FOR JURISDICTIONAL PURPOSES, A LEGAL DOMICILE, ONCE EXISTING, CONTINUES UNTIL ANOTHER IS ACQUIRED ELSEWHERE.

It would seem an easy matter to determine the legal domicile of a party to an action in cases where the question of legal domicile is one of jurisdiction. The difficulty seems to be in determining what constitutes a legal domicile or in deciding when a legal domicile has been acquired elsewhere than at the place of the original domicile. In determining the question of legal residence and domicile, it is believed that the true rule is laid down in the case of Abington v. North Bridgewater,[1] wherein the court says: "In coming to the inquiry in each case, two considerations must be kept steadily in view, and these are, 1: that every person must have a domicile somewhere; and 2: that a man can have only one domicile, for one purpose, at one and the same time. Every one has a domicile of origin, which he retains until he acquires another; and the one thus acquired, is in like manner retained." The same rule is stated in the case of Gilman v. Gilman,[2] as follows: "It is therefore an established principle of jurisprudence, in regard to the succession of property, that a domicile once acquired continues until a new one is established. Therefore the testator's domicile must be considered in Waterville, for the purpose of settling his estate, unless he had not only abandoned it, but had actually acquired a new domicile in New York." The essential ingredients of legal residence and domicile have been frequently commented upon in respect to the jurisdiction of courts in administering the estates of deceased persons, and in respect to the authority and validity of the action of courts in other jurisdictions. In Price v. Dewhurst,[3] the Lord Chancellor (Cottenham), in commenting upon the action of the Danish courts at St. Croix in allowing the joint will (which was made by persons whose domicile was in England), said: "But I find another ground, upon the evidence of the defendants, for disregarding those proceedings as deciding any question of property, and that is, that, under the circumstances of this case, the court making those decisions had no jurisdiction whatever in the matter." A legal domicile, once existing, continues until another is acquired elsewhere. This doctrine that jurisdiction once acquired is not lost by departure of either of the parties, appears, by implication at least, to be adopted in the case of Colvin v. Reed.[4] There is strong analogy between this question as a matter of jurisdiction in divorce cases, and the questions of jurisdiction in the federal courts resting on the citizenship of the parties.[5] Justice Lord, in Borland v. City of Boston,[6] says: "There

[1] 23 Pick. (Mass.) 170, see page 177.
[2] 52 Maine, 165, see pages 174-175.
[3] 4 Mylne & Craig, star pages 84-85.
[4] 55 Pa. St. (5 P. F. Smith), 375. Also in City v. Wellutz, 11 Weekly Notes of Cases, 154.
[5] Dutcher v. Dutcher, 39 Wis. 651, see page 662.
[6] 132 Mass. 89, on pages 93 *et seq.*

are certain words which have fixed and definite significance. 'Domicile' is one such word; and for the ordinary purposes of citizenship, there are rules of general, if not universal acceptation, applicable to it. 'Citizenship,' 'habitancy' and 'residence' are severally words which may in a particular case mean precisely the same as 'domicile,' but very frequently they may have other and inconsistent meanings; and while in one use of language the expressions, a change of domicile, of citizenship, of habitancy, of residence, are necessarily identical or synonymous, in a different use of language they import different ideas. The statutes of this commonwealth render liable to taxation in a particular municipality those who are inhabitants of that municipality on the first day of May of the year. Gen. St. ch. 11, §§ 6, 12. It becomes important, therefore, to determine who are inhabitants, and what constitutes habitancy. * * * We cannot construe the statute to mean anything else than 'being domiciled in.' A man need not be a resident anywhere. He must have a domicile. He cannot abandon, surrender or lose his domicile, until another is acquired. A cosmopolite, or a wanderer up and down the earth, has no residence, though he must have a domicile. It surely was not the purpose of the legislature to allow a man to abandon his home, go into another State, and then return to this commonwealth, reside in different towns, board in different houses, public or private, with no intention of making any place a place of residence or home, and thus avoid taxation. Such a construction of the law would create at once a large migratory population."

If a decree is rendered by the court without jurisdiction of the subject-matter, it is not a decree and is not entitled to the constitutional guarantee of full faith and credit in another jurisdiction. This is clearly shown by the reasoning in the case of Colvin v. Reed.[7] Stipulations consenting to such a decree at a place other than the true domicile are void upon their face, and, in consequence thereof, such a decree could be at any time repudiated at least by the defendant not residing in the foreign jurisdiction. This is clearly shown in the case of Commonwealth v. Shuler,[8] wherein the court says: "A decree of divorce in a foreign jurisdiction against a respondent who resided in this (Pennsylvania) State, and upon whom no personal service was had, and to whom no notice was given other than by publication, has no effect in this State, and will not bar an order on the libellant for the support of the respondent here." The common law of England, except as modified by positive enactments, is still in force in Pennsylvania. However much a court may regret the condition in which litigation finds the parties, it would seem clearly to be its duty, and also equitably just, for the court definitely and properly to determine their *status* in the proceeding, in view of all the facts, in order that a decree, which is clearly binding as made by a court with jurisdiction of both the subject-matter and of the parties, could be had therein. And as was said in the case of Dupuy v. Wurtz:[9] "To effect a change of domicile for the purpose of succession, there must be not only a change of residence, but an intention to abandon the former domicile, and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile and intention to adopt such place of residence as the sole domicile. Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicile." In the case of James J. O'Dea v. Mary O'Dea,[10] the court said: "We think the case of People v. Baker[11] is conclusive on the question brought up by this appeal, viz.: Whether the court in the State of Ohio had jurisdiction to try the issue raised by the petition of K, as between him and his wife, she then being a non-resident of Ohio, and never a resident of that State, nor at any time there served with process of the court. There are some differences in the detail of the circumstances of the two cases, but we think not enough to lead to any change in the result, nor sufficient to require a reconsideration of the law affecting it. The Baker case was of great importance, involving, as it did, the liberty of a citizen; it was most fully argued, and we do not perceive that the discussion in the case at bar has developed any

[7] 55 Pa. St. 375.
[8] 2 Penn. District Reports, 552.
[9] 53 N. Y. 556. See pages 561 and 562.
[10] 101 N. Y. 23, 1 Central Reporter, 785.
[11] 76 N. Y. 78.

new principle, or brought to light any authority which was not then weighed by us. We do not think the question can be more fully investigated.

Concerning the result there was, it is true, a dissent by the late learned chief judge, and the opinion recognized the fact that in other States, judgments contrary to the authorities followed in this State had been rendered. This conflict of opinion, however, much to be regretted, continues, and it yet remains for some ultimate authority to relieve the point from the difficulties now attending it, and determine the civil rights of parties whose relations, as legally defined by different State tribunals, are liable to be regarded on one side of the State line as matrimonial, and on the other side as meretricious. Adhering, however, to the rule established in this State, a majority of the court are of the opinion that the order appealed from should be reversed and the judgment of the special term affirmed, but without costs." The judgment of the special term annulled the marriage. Mary O'Dea, in that case, relied upon the Ohio decree, and was not seeking to avoid it. Yet the New York court, when the case was before it, adhered to that rule of law. And when a similar question comes up, it would seem that a court should render its decision as to the validity, or not, of a judgment according to law, and, whatever its effect, can well say, as was said in the case of Hoffman v. Hoffman:[12] "This decision may operate harshly upon innocent parties, but it cannot affect the rule of law."

In a case,[13] the plaintiff (M M T) was the * * * widow of R M T, who resided in Brooklyn for many years prior to his death in 1862, and the controversy was over certain property which she claimed as such widow. During the years 1841, 1842, 1843 and 1844, the residence of the plaintiff was in the State of New Jersey, and separate and apart from her husband, who lived in the State of New York. While this separate residence thus existed the plaintiff, in 1844, by herself and not by the agency, consent or knowledge of her husband, procured the legislature of New Jersey to pass an act to divorce the plaintiff (M M T) from her husband (R M T), and to dissolve the marriage contract as fully as if the parties had never been joined in matrimony, saving the legitimacy of the children. Of this the court, in its opinion, said: "It dissolved the marriage contract, or it did nothing. If it left the husband's marital rights unimpaired, so did it the wife's rights to the property of her husband if she survived him. It is said, however, that she is estopped from denying the force and efficiency of the legislative divorce. I do not see the elements of an estoppel in the transaction. To constitute an estoppel, the acts and representations of the party must have been designed to influence, and did influence, the other party to do acts which he would not otherwise have done, and a denial or repudiation of which will operate to his injury. There is no evidence that Todd, the husband, did anything in consequence of the act of the New Jersey legislature, which he would not have done if no such act had been passed. Besides, every estoppel must be reciprocal and binding on both parties. I have already endeavored to show that the husband was not bound or affected by the law in question. And it is another principle in the law of estoppel, that one who is not bound by it cannot claim the advantage of it." The court declared that, as the husband could not have claimed that the conduct of the plaintiff (the mother of the defendants), in procuring the passage of the New Jersey law, had the effect of an estoppel, therefore they cannot so claim, and ordered judgment entered for the plaintiff.

This question of domicile was passed upon in Adams v. Adams,[14] where the court said: "It is found that he had not been a resident of the State for six months next preceding the commencement of the action, as required by the California Civil Code, sec. 128, and that for this reason the court had no jurisdiction of the action, but that the court was imposed upon by Charles W. Adams. * * * There is no doubt that the requirement of six months' residence goes to the jurisdiction of the court."

As was said in the case of Cummington v. Belcherton:[15] "To hold that her domicile might be changed to any other State by the act of her husband in removing thereto after he had abandoned her here and ceased to support her, and thus that she could be de-

[12] 46 N. Y. 30, page 34.
[13] 42 Barb. 317.
[14] 154 Mass. 290, 291.
[15] 149 Mass. 223, 226.

prived of the protection in her marital rights, whether of person or property, which this State could extend to her, would be to use the legal fiction of a unity created by the marriage to her serious injury, and to work great injustice." To substantially the same effect is Blackinton v. Blackinton.[16] As was well said in the case of Colvin v. Reed:[17] "Here the husband had his remedy in Pennsylvania, the place of common domicile, as well as of the offense. Her courts were open to him, and had jurisdiction over the person of his wife." This case clearly shows that it was the duty of the libellant to proceed to a decree in the first instance in this court; and any attempted action by another court without jurisdiction to proceed to a purported decree, certainly does not divest the jurisdiction of this court; and this court having jurisdiction, the libellant clearly has a right to show that any purported proceedings in another jurisdiction are absolutely void, because the court was absolutely without jurisdiction of the subject-matter in such proceeding. Such a presumption would seem to have the same effect, and be subject to the rule laid down in the case of Record v. Howard:[18] "The jurisdiction assumed by the probate court was original not ancillary. It was assumed upon a representation (then satisfactorily proved) that the deceased at the time of her death was a citizen of this State. The record so states. No appeal having been taken, and no suggestion of fraud being made, we think the question of domicile must be regarded as conclusively settled for all purposes connected with the administration of the estate. To hold otherwise would subject the settlement of the estate to all the inconveniences which it was plainly the object of the statute to avoid. The record, as now made up, states in substance that the deceased, at the time of her death, was a citizen of Maine. If the record should now be made to say that she was at that time a citizen of Ohio, it would not only be self-contradictory, but self-destructive; for the want of jurisdiction would then be apparent upon the face of the record, and the protective power of the statute would cease to operate. The statute does not apply to cases where the want of jurisdiction is apparent upon the face of the record. The moment, therefore, that the record should be made to say that the deceased, at the time of her death, was a citizen of Ohio, and not a citizen of Maine, that moment the jurisdiction assumed in this case would be shown to be erroneous, and all the proceedings under it would become void, *ab initio*, and the settlement of the estate subjected to all the inconveniences which it was the object of the statute to obviate."

As was said in the case of Dutcher v. Dutcher:[19] "Doubtless, for certain purposes, the domicile of the husband is the domicile of the wife. That rule, however, goes upon the unity of the husband and wife; and very generally, if not always, implies continuing, though temporarily interrupted, cohabitation. It excludes, or should exclude, permanent separation. Permanent separation implies separate domiciles of husband and wife. If the rule were to be applied to cases of desertion, it would imply something like an absurdity. The weight of authority is against the application of the rule, as applied to cases of divorce, when the parties are actually living in different jurisdictions." See also cases cited thereto in Dutcher v. Dutcher.[20] These citations are controlling decisions in several jurisdictions of courts of the highest authority.

RUBLEE A. COLE.

Milwaukee, Wis.

[16] 141 Mass. 432.
[17] 55 Pa. St. (5 P. F. Smith) 375.
[18] 58 Me. 225, see page 229.
[19] 39 Wis. 651, see page 659.
[20] Ditson v. Ditson, 4 R. I. 87; Harteau v. Harteau, 14 Pick. 181; Payson v. Payson, 34 N. H. 518; Hopkins v. Hopkins, 35 *Id.* 474; Harding v. Alden, 9 Greenl. 140; Yates v. Yates, 13 N. J. Ch. 280; Schonwald v. Schonwald, 2 Jones' Eq. 367; Jenness v. Jenness, 24 Ind. 355.

BANKS — INSOLVENCY — RIGHT TO SET-OFF AGAINST NOTE—TRUST FUND.

STORTS v. GEORGE.

Supreme Court of Missouri, Division No. 2, May 23, 1899.

1. The maker cannot set off against a note to a bank, due when the bank made an assignment for creditors, the amount of his part payment after the assignment as co surety of an account paid by the bank to a depositor.

2. Money obtained by a note made by an insolvent bank does not, where deposited as a part of its assets, become a trust fund for the benefit of guarantors of the note who were induced by the false representations of the cashier to guaranty the same.

3. A guarantor of a note by a bank cannot set off against his own note to it, due at the time of its as-

signment for creditors, money paid as guarantor after the assignment.

This is a suit by plaintiff assignee for the benefit of creditors of the Citizens' Stock Bank, a corporation duly organized under the laws of this State, against the defendant, on two notes executed by him to said bank,—one for $1,400, dated October 7, 1890, upon which there were several credits, and the other for $125, dated May 3, 1894; both payable on demand to Joseph Field, cashier of said bank. The assignment was made on the 17th day of December, 1894. Plaintiff instituted this suit on the 21st day of October, 1895. The petition is in the usual form. The execution of the notes is not denied, but the defendant pleads what are denominated certain equitable set-offs, which are stated by him to have originated in the following manner: On the 4th of January, 1893, defendant, as surety for said bank, joined in a bond to one Winning, treasurer of Saline county, who kept some of the public funds on deposit therein, conditioned that said bank would duly pay over said money. It is alleged that at the time of the failure Winning had in the bank $2,396.78, and that this was due and payable at the time of the assignment; that defendant and his co-securities then and there became liable to pay the same; and that on the 4th of March, 1895, before the commencement of this suit, defendant paid his part of the liability due December 15, 1894, to-wit, $299.68. It is further charged in the answer that defendant, as surety for the bank, also signed a bond to the collector of Saline county to indemnify him against loss on account of deposits of public funds that he might make therein; that at the time of the failure the collector had on deposit in the bank $2,186.42, which then and there became due, and defendant and his co-securities became then and there liable therefor; that defendant, before the commencement of this suit, to-wit, on the 5th of March, 1895, paid to said collector $218.60, being his part of the sum due said collector at the time of the assignment. It is also charged that when each of said bonds was signed, the bank was insolvent, and that this was known to its cashier, who, notwithstanding, fraudulently induced defendant and his co-securities to execute the same. The answer, as to the third equitable set-off, alleges that on the 15th of November, 1894, said Citizens' Stock Bank was wholly insolvent, and that this fact was well known to its cashier, but that he concealed that fact from defendant; that said bank on that day executed its note for $25,000 to the National Bank of Commerce of Kansas City, due four months after date, bearing 8 per cent. interest, and that said cashier fraudulently represented said bank to defendant to be solvent, and abundantly able to pay said loan, and thereby induced defendant and others to make a guaranty on the back of the note as follows: "We personally guaranty the payment of the within note, and do hereby waive protest on same;" that the cashier procured the money on the faith of said guaranty, and used the same for the purposes of the Citizens' Stock Bank, when in fact the money, by reason of the insolvency of said bank, and fraudulent representations of said cashier in behalf of said bank, was held by it in trust for the defendant and his co-obligors, and that a trust attached to said fund on the 15th of November, 1894, and said fund was due to the defendant and his co-guarantors on the said 15th of November, 1894, the day it was received by said Citizens' Stock Bank; that before the institution of this suit defendant paid $2,500 to the National Bank of Commerce of Kansas City, and obtained a release from his liability upon said guaranty. The amounts paid to the collector and treasurer of Saline county by defendant, as above set out, and the sum paid by him to the National Bank of Commerce, are asked to be set off against the notes sued on, and there is the further prayer for such other and further relief as defendant may be entitled to receive. Plaintiff filed a general demurrer to the answer, which was sustained. Defendant declining to plead further, judgment was rendered for plaintiff for $873.93, the amount of the notes sued on, and the defendant appealed.

BURGESS, J. (after stating the facts): Defendant insists that the answer states and the demurrer admits that the items of $299.68 and $218.60, sought to be set off against the demands sued on, were at the time of the assignment due and payable to the treasurer and collector of Saline county, respectively; that this money was on deposit in the bank, and at the date of the assignment constituted an existing indebtedness against it, which was then due, and could have been sued for and recovered at that time; and that, as defendant, by reason of his suretyship, was compelled to substitute his money for these deposits, he is therefore entitled in equity to be subrogated to all the rights, remedies, and securities of the creditors. No principle is better settled than that when a surety pays the debt of his principal, he, by reason thereof, becomes entitled in equity to be subrogated to all his rights, remedies, securities, funds, liens, and equities which the creditor may have for the same debt. Miller v. Woodward, 8 Mo. 169; Berthold v. Berthold, 46 Mo. 557; Rubey v. Watson, 22 Mo. App. 428; Clark v. Bank, 57 Mo. App. 277; Dorsheimer v. Bucher, 7 Serg. & R. 9; Braught v. Griffith, 16 Iowa, 26. But the question in this case is as to whether defendant is in position, under the facts disclosed by the record, to invoke in his aid that rule. In passing upon this question we must first determine what rights or equities the treasurer and collector had in the moneys to their credit in the bank at the time of its assignment, for it is just such rights, and no more, that defendant can be subrogated to. It is not claimed in the argument that these funds were trust funds, so that it seems clear that the treasurer and collector were general creditors of

the bank, and that these deposits, as all others of like character, went into, and formed part of, its general funds, and by the assignment passed to the assignee for the benefit of all the creditors of the bank, unincumbered by any liens or priorities in favor of the treasurer or collector, It may be, if the suit had been against either of them upon a note executed by him to the bank, that he could have pleaded any amount due him by the bank at the time of the assignment as a set-off thereto (Smith v. Spengler, 83 Mo. 408), but in this case it is sought to set off against a suit by the assignee on notes executed by defendant to the bank, which were due at the time of the assignment, the indebtedness of the bank to other parties, to no part of which did he become entitled to be subrogated until the conditions of the bonds signed by himself and others for the protection of the treasurer and collector were complied with by them. Huse v. Ames, 104 Mo. 91, 15 S. W. Rep. 965, was a suit by the assignee of an insolvent corporation on an account, and it was held that a defendant's equitable set-off, to be available, must in such case exist at the time of the assignment. The court observed: "The *status* of the creditors is fixed by the assignment in trust for them. If the right of set-off exists at that time, it continues as against the assignee. If there is at the time an equitable right in favor of a creditor to a set-off, or to any of the property assigned, that right is not disturbed by the assignment, but the equitable right must exist at that time; and this is true whether the creditor is or is not a surety. Here the defendant had no equitable set-off at the date of the assignment, and he therefore has none now." See, also, Homer v. Bank, 140 Mo. 225, 41 S. W. Rep. 790. No right of set-off existed in favor of either the treasurer or collector as against the bank at the time of its assignment, because they nor either of them owed it anything; therefore defendant acquired none. Had the right of set-off existed in favor of the treasurer and collector against the bank at the time of its assignment, then defendant, by being subrogated thereto, would have acquired such right, and could have pleaded it as an equitable set-off to this suit, if it accrued before its institution, although after the assignment. Huse v. Ames, *supra*; Homer v. Bank, *supra*. But no such right existed in favor of either of them. Moreover, defendant, by being subrogated to the rights of the treasurer and collector, is entitled to his *pro rata* of the bank's indebtedness to them, and their equities in connection therewith; but as he did not, by reason thereof, acquire the right to have such indebtedness set off against the notes sued upon in this case, his right to do so must be regarded as extending no further back than the time of the satisfaction of the bonds, which was subsequent to the assignment. Furthermore, in no event could he have been subrogated to more than his *pro rata* part of the indebtedness of the bank to the treasurer and collector, and he and others, having satisfied this indebtedness, were jointly entitled to be subrogated to it as a whole, and not to any particular part thereof. It could not be portioned out among them, and a separate action maintained by each one for his proportionate part; and for like reason defendant could not plead his *pro rata* part as a set-off in this case. A part of the debts could not have been assigned by the persons to whom due, after the assignment, without the consent of the assignee (Burnett v. Crandall, 63 Mo. 410), and certainly no greater right could be acquired by being subrogated thereto. But it is claimed by defendant, if he is not entitled to be subrogated to the creditors' rights in the deposits, but must stand upon the implied promise to reimburse him for money paid after the assignment as surety for the bank, but before the commencement of the suit, that he is entitled to plead the same as a set-off. We are not, however, impressed with the logic of this contention. There was no assignment by the creditors, or either of them, to defendant, of their demands; hence it is only by being subrogated to their rights that defendant could plead them as a set-off to this suit. Indeed, the answer is framed upon this theory alone.

With respect to the third equitable set-off, it is claimed by defendant that the money obtained from the National Bank of Commerce, to-wit, $25,000, on November 15, 1894, was upon a note the payment of which was guarantied by himself and others, which guaranty was obtained by fraud practiced upon them by the cashier of the Citizens' Stock Bank, and, as the money thus obtained went into the coffers of the bank, and helped to swell its assets, by reason of said fraud it became a trust fund for the use of defendant and his co-guarantors, and, he having paid his *pro rata* part of the money thus obtained, to-wit, $2,500, a right of action accrued to him as soon as the money was obtained. We are unable to see how the money obtained by the Citizens' Stock Bank, upon a note whose payment defendant and others were induced to guaranty by reason of false and fraudulent representations, when deposited in said bank became a trust fund for their benefit; and no reason is given in defendant's brief, why it is so. And, as defendant as guarantor paid the money for the Citizens' Stock Bank, after the bank assigned he cannot set off the amount paid against the notes sued on. This question was before this court in Huse v. Ames, *supra*, in which it is said: "While the insolvent is not bound to pay otherwise than according to his contract, it is considered no hardship that he should accept payment of a demand owing to him before maturity. Hence it has been often ruled in the State of New York, and is now the law of this State, that, if the claim against the assignee was due at the date of the assignment, then there is an equity because of the insolvency of the assignor, and the debt so

due may be set off against the claim in favor of the assignee, though the claim held by the assignee was not due at the date of the assignment. Smith v. Spengler, 83 Mo. 408; Smith v. Felton, 43 N. Y. 419; Smith v. Fox, 48 N. Y. 674; Coffin v. McLean, 80 N. Y. 560. But the claim against the assignee must be due at the date of the assignment, and, if it is not then due, there is no equitable set-off. Keep v. Lord, 2 Duer, 78; Myers v. Davis, 22 N. Y. 489; Chipman v. Bank, 120 Pa. St.86.13 Atl. Rep.707." "A demand cannot be set off because of the insolvency of the plaintiff in equity any more than at law, unless it existed against the plaintiff in favor of the defendant at the time of the commencement of the suit, and had then become due. Reppy v. Reppy, 46 Mo. 572; Spaulding v. Backus, 122 Mass. 553; Pom. Eq. Jur. § 704; Lockwood v. Beckwith, 6 Mich. 168. To justify a set-off against an assignee for the benefit of creditors, there must be a present debt due at the date of the assignment. In this respect a surety stands on no better footing than any other creditor. The defendant had no such debt against the assignor at the date of this assignment. Indeed, he had no such debt when this suit commenced." See, also, Homer v. Bank, *supra*. Our conclusion is that the demurrer was properly sustained, and that the judgment should be affirmed. It is so ordered.

NOTE.—An assignee for the benefit of creditors takes the assigned estate subject to all off-sets existing at the time of the assignment. Green v. Conrad, 114 Nev. 651, 21 S. W. Rep. 839. Defendants were indebted to a corporation on account. They also held the agreement of the corporatioa to deliver certain goods. No demand was ever made for the goods and later the corporation made a general assignment for the benefit of creditors. Held, in an action by the assignee to recover of the defendants on the account, that since by the assignment the corporation disabled itself to deliver the goods, defendants right to damages accrued at once, and could be set off against the claim of the corporation, under Gen. St. 1878, ch. 66, par. 97, which, "in actions arising on contracts," allows as a counterclaim or set-off "any other cause of action arising also on contract, and existing at the commencement of the action" or could be set off in equity independent of the statute. Layborun v. Seymour, 54 N. W. Rep. 941. When plaintiff is insolvent, an equitable set-off will be allowed, though an assignment for the benefit of creditors has been made by the insolvent under the statute. St. Paul & M. Trust Co. v. Leck, 58 N. W. Rep. 826. A debtor cannot off-set agafnst his own note in the hands of an assignee. A note of the assignor to himself, which he had indorsed and transferred, and which, after the assignment he was compelled to take up and pay as an indorser. Chance v. Isaacs, 5 Paige, 592. A vendee may set-off a note of the vendor, held at the time of his assignment, in an action by the latter's assignee upon the debt assigned; the note maturing before the credit upon which the goods were sold expired. Moss v. Gordman, 2 Hilt, 275. A claim may be assigned for the benefit of creditors, and the assignee will hold it free from any claim in set off not mature at the time of the assignment. Before an assignment for the benefit of creditors, an assignor ordered goods to be manufactured for him, and they were completed within reasonable time, though after the assignment, and tendered to the assignee. Held, that the price of the goods could not be set-off against a debt of the manufacturer included in the assignment. Myers v. Davis, 22 N. Y. 489. Plaintiffs, assignees for the benefit of creditors, received among the assets of the debtor, a mortgage made by a third party, and assumed by M. The mortgage was not due when assigned to plaintiffs. M had, at the time of the assignment, a balance on deposit with the debtors, who were bankers, and a certificate of deposit, payable on demand, issued by them. Code, Civ. Proc. par. 501, provides that any cause of action on a contract existing at the commencement of a suit on a contract may be set up as a counterclaim. Section 502, subd. 1, provides that in a suit by the assignee of a contract, defendant can set-off a claim owned by him at the time of the assignment, "if it might have been allowed against the party or the assignee while the claim belonged to him. Held that, as the mortgage was not due at the time of the assignment, M could not at that time have set off either the deposit or certificate against the mortgage, and could not, therefore, set them off in a suit by the assignees to foreclose the mortgage when it became due. Richards v. La Tourette (N. Y.), 22 N. E. Rep. 531. In an action by an assignee for the benefit of creditors to recover a debt due the assignor, defendant cannot set off a note made by the assignor which fell due after the assignment, and which he was required to pay as accommodation guarantor. Groff v. Friedline (N. Y.), 14 Misc. Rep. 237. A debtor of an assigned estate, who claims to set-off a due bill of the assignor, must show that he became a *bona fide* holder for value of such bill before the assignment; and in determining this question evidence may be given of the time of day of the execution of the assignment. Collins v. McKee (Pa.), Leg. Int. 167. A firm made an assignment, part of its assets consisting of a sum on deposit in defendant bank. The assignee made demand for the deposit, which was refused and he brought suit. After the demand, but before suit, a note against the assignors held by the bank at the date of the assignment, matured. Held, that it could not be set-off in a suit by the assignee. Chipman v. Ninth Nat. Bk. (Pa.), 13 Atl. Rep. 707. The right to set-off is wholly statutory, and under 2 Hill's Code, Wash. par. 806, when a party is sued by the assignee of a chose in action, he cannot plead against the assignee a set-off which he holds against the assignor unless the demand sought to be set-off existed at the time of the assignment, and belonged to the party in good faith before notice of such assignment. Harrisburg Trust Co. v. Shefield, 87 Fed. Rep. 669. A party owning the building in which a bank did business, after its failure, assigned his claim for rent due and to become due. He was indebted to the bank and his debt was past due. Assignee sued the bank's receiver to recover, who pleaded a set-off. Held, that the past due indebtedness could not be allowed as a set-off against that portion of the assigned debt which was not due at the time of the assignment. Koegel v. Michigan Trust Co., 76 N. W. Rep. 74. In an action by the assignee of an insolvent banking corporation to recover money due it, defendant may set-off deposits due them from the bank at the time of its failure. Bernstein v. Coburn (Neb.), 98 N. W. Rep. 1021. A creditor of an insolvent banker cannot set-off an immatured certificate of deposit issued by such banker, in an action against him by the assignee. Taylor v. Weir, 63 Ill. App. 82. A and B were two of five sureties on a joint

and several bond to a county, executed that, the principals, doing a banking business, might be designated a depositary for county funds under Gen. St. 1894, par. 729, *et seq.* They were also indebted to the principals on a note, A, as principal, and B, as surety. While having county funds in their hands, the principals made an assignment for the benefit of their creditors, and the makers of the note then filed a petition showing that they had paid the county a certain sum which was one-half of the funds on deposit when the assignment was made, and praying that the payment might be set-off against the note in the hands of the assignee in insolvency. Held, that B being merely surety of the note was not entitled to the set off. *In re* Smith (Minn.), 68 N. W. Rep. 76. In the distribution of an insolvent estate by the assignee, the sureties of the assignor on an official bond on which they have been compelled to pay a deficit in his accounts, are entitled to be subrogated to the rights of the obligee in the bond. Appeal of Lebanon County (Pa.), 19 Atl. Rep. 303. In a suit by an assignee to foreclose a mortgage, a purchaser from the mortgagor, who assumed payment of the mortgage, may set-off against the claim of the assignee a indebtedness due to him (the purchaser) from the assignor. Salladin v. Mitchell (Neb.), 61 N. W. Rep. 127. An insolvent bank was guarantor of two notes of $5,000, which it had discounted at another bank, and for which it had been given credit on account. At the same time such other bank was indebted to the insolvent bank $4,000 on account. Held, that it was not entitled to treat the amount as an equitable set off. Mechanics' Bank v. Stone (Mich.), 74 N. W. Rep. 204. Where assignors, for the benefit of creditors, before the assignment, convert stocks held by them as collateral security for debts due them, such debts may be set-off against the claims of the owners of such stocks against the assigned estate. Appeal of Jamison (Penn.), 29 Atl. Rep. 1003. A treasurer, being authorized by the supervisors, deposited county money in a private bank, which soon afterwards made an assignment. Plaintiffs, who were sureties on the bond given by the bank, paid the amount deposited, and brought an action against the assignee to recover the money on the ground that it was a trust fund. Held that, the facts that the sureties were induced to sign the bond by fraud of the bank, and that the bank was insolvent when the deposits were made, do not give the sureties an equity against the funds in the hands of the assignee superior to that of the general creditors. Caldwell v. King (Iowa), 50 N. W. Rep. 975; McHenry v. King (Iowa), 50 N. W. Rep. 977.

A. M. STURDEVANT.

BOOK REVIEWS.

RANDOLPH ON COMMERCIAL PAPER, SECOND EDITION, 3 VOLUMES.

Joseph F. Randolph has heretofore made his appearance before the profession as editor of Jarman on Wills and Williams on Executors, also as author of first edition of Randolph on Commercial Paper, which was published in 1886. The author modestly says in his preface that he has not in this treatise attempted to instruct the courts, but rather sought to be instructed by them. Although, strictly speaking, this is a text book, yet its arrangement partakes of the nature of a digest, or perhaps, more properly, a treatise reduced to rules accompanied by copious illustrations, and containing a full statement of existing American and foreign statutes, also commercial codes of European countries. About 2,500 cases are cited. An immense amount of labor must have been put into these volumes. The author seems to have very successfully established or drawn from the labyrinth of decisions on this subject very many indisputable rules of law well calculated to render great assistance to the searcher after established principles, supported by so many citations of authorities as will enable the briefmaker to thereafter draw therefrom his own conclusions. Litigation, involving commercial paper, is frequent and close. The busy lawyer will be materially aided by consulting these volumes, where he may find ready reference to every possible phase of the subject likely to arise. The paper, printing and binding are exceptionally good. Published by West Publishing Co., St. Paul, Minn.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Election by Widow.—Although the statute provides for a formal election by the widow whether she will take under the will of her deceased husband, in lieu of the share which the law gives her, an election may be made by acts *in pais;* and hence the record is not the only proof of such election.—REVILLE v. DUBACH, Kan., 57 Pac. Rep. 522.

2. ADMINISTRATION—Executor's Bond—Liability of Sureties.—A distributee having, pursuant to a private arrangement with one of two joint executors, accepted

his individual check for the amount of her distributive share, and in consideration thereof assented to the delivery of her share of the fund to such executor, and executed her receipt in full to the executors on account of such share, cannot, upon the dishonor of the check, maintain an action against the executors and the sureties upon their joint bond; the act of the executor in drawing his individual check being apart from his duties in the execution of the trust.—RIGGIN v. CREATH, Ohio, 53 N. E. Rep. 1100.

3. ALTERATION OF CONTRACT—Materiality.—An alteration of a written contract by adding a provision thereto is material where, although the rights of the parties would be the same if no contract had been made on the subject covered by the provision, its incorporation in the writing would have rendered inadmissible parol proof of a different agreement, which, as the contract was written, would be competent.—BRADY v. BERWIND-WHITE COAL MIN. CO., U. S. C. C., E. D. (Penn.), 94 Fed. Rep. 28.

4. ATTORNEY AND CLIENT—Contract for Legal Services.—A contract between attorney and client for the rendition of legal services in connection with an estate to which the client was an heir, providing that the attorney's compensation should "in no event be more" than that received from other heirs similarly interested, nor more than a certain per cent. of the amount recovered for the client, does not fix the amount of compensation, but merely imposes maximum limits thereto, leaving the amount to be determined on a *quantum meruit*, within such limits.—RUSSELL v. YOUNG, U. S. C. C. of App., Sixth Circuit, 94 Fed. Rep. 45.

5. BANKS AND BANKING—Authority of President — Misappropriation of Funds.—If the directors of a bank, trusting the president's integrity or individual responsibility, authorized him to use drafts drawn on its funds for private purposes, whether paid for at the time or not, any loss resulting from the misuse of such authority would fall on the bank, and not on a third person, who had taken the drafts for value and in good faith, which in such case would be determined by the established rules governing the transfer of negotiable paper.—LAMSON v. BEARD, U. S. C. C. of App., Seventh Circuit, 94 Fed. Rep. 30.

6. BANKS AND BANKING—Check — Forged Indorsement.—Where plaintiff made a deposit, with direction to the bank to pay it out on checks drawn by J, payable to certain persons, payment of the checks named on J's forged indorsement constitutes no defense to plaintiff's action against the bank to recover the deposit.—RICE v. CITIZENS' NAT. BANK, Ky., 51 S. W. Rep. 454.

7. BANKRUPTCY—Final Dividend.—Where the trustee in bankruptcy has collected and reduced to cash all the assets of the estate, and has the same ready for distribution, the estate will be closed, and a final dividend, including the entire fund, will be declared and paid to creditors whose claims have been proved and allowed, notwithstanding the fact that the period of one year from the date of adjudication, within which time creditors may prove their claims, has not yet expired, and creditors proving thereafter will only be entitled to subsequently discovered assets and unclaimed dividends.—IN RE STEIN, U. S. D. C., D. (Ind.), 94 Fed. Rep. 124.

8. BANKRUPTCY—Preferences — Accounting by Preferred Creditor.—A lease of a manufacturing establishment, made by an insolvent debtor to one of his creditors, as part of a fraudulent scheme to place his property within the exclusive control of such creditor, and accepted by the latter with knowledge of the lessor's insolvency, and with the intention of securing to himself an advantage over the other creditors, will be set aside, on petition of the lessor's trustee in bankruptcy, as fraudulent and preferential; and the lessee will be required to account to such trustee for the net profits of the business conducted by him on the premises while the same remained in his possession.—CARTER v. HOBBS, U. S. C. C., D. (Ind.), 94 Fed. Rep. 108.

9. BANKRUPTCY—Provable Debts—Alimony.—A judgment in divorce proceedings requiring the defendant to pay alimony to the plaintiff in fixed weekly installments is a provable debt against the defendant's estate in bankruptcy, as to any installments due at the date of adjudication, and will be released by the discharge of the bankrupt.—IN RE HOUSTON, U. S. D. C., D. (Ky.), 94 Fed. Rep. 119.

10. BANKRUPTCY—Time of Filing Petition.—The four months after the commission of an act of bankruptcy within which, under the provisions of the bankrupt act of July 1, 1898, a petition in involuntary bankruptcy must be filed, are to be so computed as to exclude the day on which such act was committed; hence, where the act of bankruptcy was committed October 20, 1898, the petition could properly have been filed February 20, 1899.—IN RE STEVENSON, U. S. D. C., D. (Del.), 94 Fed. Rep. 110.

11. BENEFIT ASSOCIATIONS—Rights of Member.—Under the evidence produced at the trial of this action, brought to recover under a certificate of membership issued by a mutual aid association, as to plaintiff's payment of his monthly dues, which, according to the contract, were payable in advance, and defendant's methods in respect to receiving the same, it is held that prompt payment was waived, and that defendant is estopped from asserting that plaintiff's rights lapsed at any time or were forfeited.—RICHWINE v. LA CROSSE MUT. AID ASSN., Minn., 79 N. W. Rep. 504.

12. BILLS AND NOTES—Defenses—Failure of Consideration.—In an action on a note given in consideration of the transfer of a mining lease and bond, where the defense of a failure of consideration depends for its existence on the allegation that two of the lessors did not properly authorize one who signed the lease and bond for them as attorney in fact, the burden of proving such facts, though negative, is on defendant.—SCOTT v. FLEETFORD, Colo., 57 Pac. Rep. 485.

13. BILLS AND NOTES—Indorser—Notice of Dishonor.—Under the law merchant, notice to prior indorsers of the dishonor of a bill is not necessary in order to hold the last indorser liable; and that rule is not changed by Ky. St. § 3725, providing that it shall be the duty of notaries "to give or send notice of the dishonor of such paper to such of the parties thereto as are required by law to be notified, to fix their liability on such paper."—LYDDANE v. OWENSBORO BANKING CO., Ky., 51 S. W. Rep. 453.

14. BUILDING & LOAN ASSOCIATION—Loan Associations—Conflict of Laws.—A foreign loan association stock certificate made all payments to the association payable at the home office, and the by-laws provided that applications for loans were to be submitted to the directors at the home office; that interest on loans was to be paid monthly in advance, with dues; that the borrower who paid his loan before maturity could withdraw his stock or continue it as an investment, and in repaying the loan he forfeited the premium and interest thereon. Held, that the contract of loan was governed by the law of the State where the corporation was organized, and in which it was to be performed, as to the rate of interest to be paid, and not by that of the State where the action was brought.—INTERSTATE BUILDING & LOAN ASSN. OF ATLANTA, GA., v. POWELL, S. Car., 33 S. E. Rep. 855.

15. CANCELLATION OF INSTRUMENTS — Offer to Do Equity.—Offer by a grantor, seeking to cancel a deed of homestead because of imperfect execution, to set off against the price received, which he should return, a claim against the grantee for timber cut on the land, in the absence of agreement for such set-off, or of intervening equity requiring it, is not a sufficient offer to do equity to entitle him to the relief sought.—LOXLEY v. DOUGLAS, Ala., 25 South. Rep. 998.

16. CARRIER OF PASSENGERS—Negligence—Presumption.—One who boarded a train knowing that it was run for a particular class of excursionists, and that it did not stop at regular stations, and which was not left at a place where an invitation to all persons to

take passage therein could be implied, will not be presumed to have been a passenger thereon.—FITZGIBBON v. CHICAGO & N. W. RY. CO., Iowa, 79 N. W. Rep. 477.

17. CARRIER OF PASSENGERS—Street Railways—Degree of Care.—A street railway company is bound to the highest possible caution and prudence in letting off its passengers at its stopping places, and its employees must not merely wait a reasonable time to enable the passengers to alight, without looking to see whether such has been done, but they must see and know that the passengers are safely off before starting the car in motion again.—LEAVENWORTH ELECTRIC R. CO. v. CUSICK, Kan., 57 Pac. Rep. 519.

18. CONSTITUTIONAL LAW — Municipal Ordinance — Meat Inspection.—Ordinance No. 14,807, C. S., which provides a meat inspection service, and a precedent observance thereof, as a condition of the right to either expose same for sale, or to sell the same in the city of New Orleans, is legal, valid and constitutional, and same evidences a proper and legal exercise of police power, for the protection and preservation of the public health and sanitation of the municipality.—CITY OF NEW ORLEANS v. LOZES, La., 25 South. Rep. 979.

19. CONTRACTS—Actions by Assignee—Counterclaim and Set-Off.—Averments by defendant in an action on a contract that, because of plaintiff's failure to perform, he was compelled to employ labor, and pay therefor, to prevent a loss, will not entitle him to introduce evidence of a payment, nor of a mere counterclaim to plaintiff's demand.—FARMERS' & TRADERS' NAT. BANK OF LAGRANDE v. HUNTER, Oreg., 57 Pac. Rep. 424.

20. CONTRACT—Building Contracts—Architect's Certificate.—Under a contract to complete a building to the satisfaction of the architect, the execution of a certificate by the architect is a condition precedent to the right to sue for the contract price, unless the refusal to certify is based on fraud, bad faith, or clear evidence of mistake on the part of the architect; and a finding of a referee that the contractor had substantially completed the work according to the contract is not equivalent to a finding that the architect acted in bad faith or under a mistake.—COORSEN v. ZIEHL, Wis., 79 N. W. Rep. 562.

21. CONTRACT—Parties.—A contract to pay B, S or G a sum of money, in trust, for the purpose of macadamizing a public road, is joint, and all the obligees must join in an action thereon, where there is nothing in the contract authorizing a less number to sue.—SLAUGHTER v. DAVENPORT, Mo., 51 S. W. Rep. 471.

22. CONTRACTS—Rescission—False Representations.—To support a defense of false representations in the sale of land, the purchaser testified that the vendor's agent said "they considered the land one of the finest sections they had on the mountain," and, when asked how it compared with land they were on, said, "If there is any difference, it is better than this;" and, when witness objected to buying it without seeing it, he said witness "could trust his word;" that he was well acquainted with the land, and witness would be well satisfied with it. Held an expression of opinion, merely, and not a positive representation of fact.—STEVENS v. ALABAMA STATE LINE CO., Ala., 25 South. Rep. 995.

23. CONTRACTS—Sale of Standing Timber.—An owner of land selling the standing timber thereon, and agreeing that the vendee may use his sawmill free of charge, does not guaranty the mill to be in good order, or to be suitable for sawing the timber.—UNRUH v. TAYLOR, Del., 43 Atl. Rep. 515.

24. COPYRIGHT—Infringement—Literary Production of Employee.—The literary product of a salaried employee, the result of compilations made in the course of his employment, becomes the property of the employer, who may copyright it, and when so copyrighted the employee has no more right than a stranger to copy or reproduce it; but he is not debarred from making a new compilation from the same original sources, nor, in so doing, from making use of the experience and information gained in his employment.—COLLIERY ENGINEER CO. v. UNITED CORRESPONDENCE SCHOOLS CO., U. S. C. C., S. D. (N. Y.), 94 Fed. Rep. 152.

25. CORPORATIONS — Note — Business Manager.—The statutes of this State do not know such officers of corporations as "business managers," nor do the courts judicially know the usage of corporations to appoint them, nor that the authority rightfully exercised by them when appointed includes the execution of promissory notes in behalf of the corporation. Hence a petition upon a promissory note, which note is signed in the name of the corporation by a person who described himself as its business manager, but which petition makes no allegation of authority in the person signing the note, does not state a cause of action.—TOPEKA CAPITAL CO. v. REMINGTON PAPER CO., Kan., 57 Pac. Rep. 504.

26. CORPORATIONS—Right to Membership—Restrictions.—The defendants subscribed and paid for stock and accepted certificates therefor in a corporation which, by its charter, restricted the right to hold stock therein to persons of a certain nationality, to which the defendants did not belong. The corporation accepted them as stockholders, and, without objection from them, they appeared as stockholders on the books of the corporation for three years, when the corporation became insolvent. In the meantime debts were contracted by the corporation, which are unpaid. Held, that the defendants are estopped, as against creditors, to assert that they are not stockholders because they were not in fact eligible to membership in the corporation.—BLIEN v. RAND, Minn., 79 N. W. Rep. 606.

27. CORPORATIONS—Stock Assessments.—The fully paid-up stock of a corporation is the personal property of the owner, and the articles of incorporation and laws of the State are elemental of the contract existent between the corporation and the owner of stock, and may not be so amended by legislative enactment as to make the paid-up stock subject to an assessment or general or specific assessments, and forfeitable or subject to summary sale by the corporation for the nonpayment of such assessment.—ENTERPRISE DITCH CO. v. MOFFITT, Neb., 79 N. W. Rep. 560.

28. CORPORATIONS—Suit by Stockholders in Behalf of Corporation.—A stockholder, to maintain a bill in his own name against the officers and directors of a corporation to recover misappropriated funds, must allege that he has demanded that the managing board of the corporation bring the suit, and that they have refused; that he then applied to the stockholders as a body to cause the suit to be brought, but without success; or facts must be alleged which would show that such applications would be refused if made, or be unavailing for the reason that the persons applied to are interested in preventing the action from being brought, or are the wrongdoers, or that an application cannot be made to the stockholders in time to be availing.—MONTGOMERY LIGHT CO. v. LAHEY, Ala., 25 South. Rep. 1006.

29. COUNTIES—Gravel-Road Bonds.—The gravel-road bonds are not negotiable, no one promising to pay them, and are not evidence that valid assessments were made; and the holder is bound to take notice of the statute under which they were issued, and its settled construction.—KIRSCH v. BRAUN, Ind., 53 N. E. Rep. 1082.

30. COUNTIES—Unorganized Counties—Indebtedness.—An organized county has no power to create an indebtedness against an unorganized county, attached to it for judicial and other purposes, which will be a valid obligation or indebtedness against the latter county as a municipality, when it thereafter comes into being by organization.—FIRST NAT. BANK OF DETROIT v. BOARD OF COMMRS. OF BELTRAMI COUNTY, Minn., 79 N. W. Rep. 591.

31. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—Where the deceased was killed while in the act of entering the store of accused, his dying declara-

tion that he had been sent to the store to make a purchase was admissible to show that he did not go there to renew a previous difficulty.—REDMOND v. COMMONWEALTH, Ky., 51 S. W. Rep. 565.

32. CRIMINAL EVIDENCE—Murder—Statements by Accused Under Arrest.—A statement voluntarily made by a defendant charged with murder, to the officer who had arrested him, pretending to narrate the circumstances of the decedent's death, after a promise by the officer, on the request of defendant, that he would not repeat the statement until after defendant had gone before the grand jury and made it there, is admissible, though the officer repeated it to the county attorney before the defendant went before the grand jury, where such statement, if true, is in defendant's favor.—STATE v. NOVAK, Iowa, 79 N. W. Rep. 465.

33. CRIMINAL LAW—Election Between Offenses.—A defendant, prosecuted by indictment containing a single count charging a single offense, but upon the trial of which evidence of two or more separate offenses is introduced by the State, may delay the making of a motion to compel an election as to the offense upon which a conviction will be asked until the conclusion of all the evidence in the case.—STATE v. GAUNTS, Kan., 71 Pac. Rep. 503.

34. CRIMINAL LAW—False Swearing—Materiality of Testimony.—To constitute the offense of false swearing, under Ky. St. § 1174, it is not essential that the alleged false testimony should have been material.—MILSTEAD v. COMMONWEALTH, Ky., 51 S. W. Rep. 451.

35. CRIMINAL LAW—Former Jeopardy.—Where a juryman was directed by the court to leave the jury box, and he stood aside in the court room under the eye and in the presence of the court, but immediately, on defendant's objection to his being taken off the jury, he was directed to resume his place on the jury, there is no discharge of the jury, and such facts cannot be pleaded as former jeopardy.—LEWIS v. STATE, Ala., 25 South. Rep. 1017.

36. CRIMINAL LAW—Malicious Mischief—Injury to Public Building.—Willful injury, within the meaning of Gen. St. § 1423, providing that every person who shall willfully injure any public building shall be punished, etc., is an injury done wantonly, or with an evil intent, and does not include a slight injury to a building done under an honest, though erroneous, belief of authority in the performance of a supposed duty.—STATE v. FOOTE, Conn., 43 Atl. Rep. 488.

37. CRIMINAL LAW—Rape—Reasonable Doubt.—In a criminal case, a charge that, to justify acquittal, a doubt must be real, not a merely possible or imaginary one, and that the proof is sufficient if it shows guilt to a moral certainty, such as firmly and fully convinces the understanding of prudent men, is proper.—STATE v. LONG, Conn., 43 Atl. Rep. 493.

38. CRIMINAL LAW—Separation of Witnesses.—Where the court, after putting the witnesses under rule, permitted one who was jointly indicted with accused to remain in the court room, supposing that he was not to be used as a witness, it was error to refuse to permit him, for that reason, to testify for accused, he being the only eyewitness besides accused offered on his behalf.—PARKER v. COMMONWEALTH, Ky., 51 S. W. Rep. 573.

39. CRIMINAL PRACTICE—Information—Allegation of Time.—Under sections 4737, 4742, Rev. St., it is not necessary that the information state the precise time at which the offense is alleged to have been committed. It is not essential, under the provisions of section 4811, Rev. St., that the accused should be present at the filing and trial of motions and pleas not involving the question of his guilt or innocence on the merits.—STATE v. WOOLSEY, Utah, 57 Pac. Rep. 426.

40. DAMAGES—Breach of Contract for Adoption.—The measure of damages for breach of a contract by one person to adopt another and make the latter an heir, under the law of Pennsylvania, is not the value of the share of the promisor's estate at his death which would have been inherited by the promisee, but the value of the services rendered or outlay incurred by the promisee on the faith of the promise, with interest.—SANDHAM v. GROUNDS, U. S. C. C. of App., Third Circuit, 94 Fed. Rep. 83.

41. DEED—Construction—Contingent Remainder.—Where, under a deed from a husband, the estate is limited to the wife for life, remainder to the heirs of the bodies of the husband and wife, the freehold being in the wife alone, the limitation over is a remainder, and the heirs take as purchasers, and not by descent.—MUDGE v. HAMMILL, R. I., 43 Atl. Rep. 544.

42. DEED—Delivery—Rights of Third Parties.—An instrument transferring property even though recorded, cannot be given effect to the prejudice of third parties, who acquired rights in the property before the actual delivery of the conveyance.—BARNES v. COX, Neb., 79 N. W. Rep. 550.

43. DEED—Record—Acknowledgment.—Where, at time of presentation of a conveyance for record, it was the duty of the clerk to see that the certificate of acknowledgment was attested by the proper seal, and he in fact received and recorded the instrument, it will be presumed that the certificate was so attested, and that the officer so executing it was authorized to do so; so that a copy of the instrument, showing by a scroll that the original certificate had a seal, may be received as a certified copy.—CAUDLE v. WILLIAMS, Tex., 51 S. W. Rep. 560.

44. DEED IN ESCROW—Delivery—Title.—An instrument for the conveyance of lands without substantial valuable consideration, deposited with a third person as an escrow, to be by him delivered to the grantee on the death of the grantor, does not, by relation, vest the title in the grantee at the date of the first delivery, to the prejudice of persons who thereafter, without knowledge of the instrument, extend credit to the grantor.—RATHMELL v. SHIREY, Ohio, 53 N. E. Rep. 1098.

45. EMPLOYERS' LIABILITY INSURANCE—Construction of Policy.—A policy issued by a casualty company against employers' liability is a contract of indemnity, in which the parties have a legal right to insert any stipulations and conditions which they deem reasonable and necessary, provided no principle of public policy is thereby contravened.—RUMFORD FALLS PAPER CO. v. FIDELITY & CASUALTY CO., Maine, 43 Atl. Rep. 503.

46. EQUITY—Jurisdiction.—A bill by the assignee of a contract with the government, who had completed the work thereunder, against the assignor, who was insolvent, and owed the assignee on account of the contract more than was due from the government, and who had filed objections with the government against payment to the assignee, to enjoin the assignor from collecting or receiving the money due for the work, and to settle, as between the parties, which had the better right to the fund, is within the cognizance of equity.—DULANEY v. SCUDDER, U. S. C. C. of App., Fifth Circuit, 94 Fed. Rep. 6.

47. EVIDENCE—Action on Acceptance.—Parol Evidence.—In an action on an absolute acceptance in writing, evidence of a contemporaneous oral agreement, making the acceptance conditional, is inadmissible.—BURNS & SMITH LUMBER CO. v. DOYLE, Conn., 43 Atl. Rep. 483.

48. FALSE IMPRISONMENT—Joint Tort-Feasors—Satisfaction of Judgment.—Plaintiff, having sued the complaining witness, the magistrate, and constable for false imprisonment under void proceedings, and having obtained judgment, which was satisfied, cannot sue for such imprisonment the sheriff, into whose hands plaintiff was delivered by the constable, though in the first action it was stated that the false imprisonment continued till the time of plaintiff's delivery to the sheriff, while in the second action it is alleged to have commenced at that time; plaintiff being entitled to recover all the damages in the first action, and satisfaction of the judgment therein being a release of all

the joint wrongdoers.—BLACKMAN v. SIMPSON, Mich., 79 N. W. Rep. 573.

49. FEDERAL COURTS—Jurisdiction—Existence of Different Remedy in State Courts.—The fact that an original action for a *mandamus* will lie in the courts of the State against a municipal corporation or its officers to compel the payment of bonds issued by the corporation or the levy of a tax for their payment does not deprive the holder of such bonds of the right to maintain an action to recover judgment thereon in a federal court, where the requisite diversity of citizenship exists; a judgment being a necessary preliminary to the issuance of a writ of *mandamus* by such court, which only grants it in aid of an existing jurisdiction, and not as an original remedy.—SHEPARD v. TULARE IRR. DIST., U. S. C. C., S. D. (Cal.), 94 Fed. Rep. 1.

50. FRAUDS, STATUTE OF—Parol Evidence.—The defendant signed and delivered to plaintiff's agent a writing, the material part of which is as follows: "Friend Geo.: Pop Dyer has been up to see me about a bill that he owes your concern. If they will give him time, I will see that the bill is paid, with interest." Held, that the writing is sufficient to satisfy the statute of frauds; that parol evidence is admissible to identify the parties and the subject-matter of the writing, and to show that the person to whom the writing is addressed was the plaintiffs' agent; and that the forbearance of the plaintiffs' for six months, to sue the bill referred to is a sufficient consideration for the defendant's promise.—HASKELL v. TUKESBURY, Me., 43 Atl. Rep. 400.

51. FRAUDULENT CONVEYANCES—Deeds.—Under allegation that a deed purporting to be for a valuable consideration was in fraud of creditors, and was without any or on a totally inadequate consideration, evidence was competent that part of the consideration was the surrender of former deeds on the same property, and that these deeds were collusively withheld from record.—H. B. CLAFLIN & CO. v. FREUDENTHAL, N. J., 43 Atl. Rep. 529.

52. FRAUDULENT CONVEYANCE—Knowledge of Vendee.—The insolvency of a vendor may be considered, in connection with other material facts, in determining the good faith of the parties to a sale of property; but it cannot be said, as a matter of law, that a knowledge of the insolvency of the vendor alone is sufficient to charge the purchaser with notice of a fraudulent intent on the part of the vendor.—VICKERS v. BUCK STOVE & RANGE CO., Kan., 57 Pac. Rep. 517.

53. FRAUDULENT CONVEYANCES—Unsecured Creditors.—A creditor who has not reduced his claim to judgment, or otherwise secured a lien therefor on the property of the debtor, cannot attack an attachment levied on the property of his debtor, or the *bona fides* of the appointment of a receiver therefor.—SMITH v. SIOUX CITY NURSERY & SEED CO., Iowa, 79 N. W. Rep. 457.

54. GUARDIAN AD LITEM—Allowance.—Ordinarily the control of an infant's property, forming the subject of an action in court, for the purpose of enforcing payment of the allowance made to his guardian *ad litem* for services and disbursements therein, should not go further than the income thereof; but where there is no income, or not sufficient to secure payment of such allowance within a reasonable time, sufficient of the property should be sold for that purpose.—TYSON v. RICHARDSON, Wis., 79 N. W. Rep. 439.

55. HIGHWAYS—Collision by Travelers.—In an action by a traveler to recover damages for injuries received from a collision with another in the highway, whether plaintiff was exercising reasonable care to avoid the injury is a question for the trial court.—LORD v. LAMONTE, Conn., 43 Atl. Rep. 491.

56. HIGHWAYS—Prescription.—The easement of the public in a highway, as against the owner of the fee, is not affected by the building of a railroad across it before the limitation by prescription; the railroad not acquiring the fee, but only an easement.—GALVESTON, H. & S. A. RY. CO. v. BAUDAT, Tex., 51 S. W. Rep. 541.

57. HOMESTEAD—Right of Widow.—A wife, though forced by her husband's cruelty to abandon him, is on his death entitled to have set aside to her, under Rev. St. art. 2046, as a homestead exemption, property which the husband, coming to Texas after such abandonment, thereafter acquired and lived on alone till his death.—LINARES v. LINARES, Tex., 51 S. W. Rep. 510.

58. INSURANCE—Avoidance of Policy for Fraud.—False statements knowingly made by the insured in his proof of loss with intent to defraud insurer avoid policy, and prevent recovery thereon, although insurer was not misled to its detriment.—FOWLER v. PHOENIX INS. CO. OF HARTFORD, CONN., Oreg., 57 Pac. Rep. 421.

59. INSURANCE—Option to Repair.—Where an insurance policy provides for arbitration, and reserves to the company the option to repair, a demand by it for arbitration precludes its afterwards exercising the option to repair, whether or not an award was reached.—ELLIOTT v. MERCHANTS' & BANKERS' FIRE INS. CO., Iowa, 79 N. W. Rep. 452.

60. JUDGMENT — Satisfaction —Assignment.—A judgment which has been paid and extinguished by the owner of land upon which it was a lien cannot be afterwards revived for the purpose of cutting out other liens.—HENRY & COATSWORTH CO. v. HALTER, Neb., 79 N. W. Rep. 616.

61. JUSTICES OF THE PEACE—Notice of Appeal.—A notice of appeal from justice court, which fails to state the amount of the justice's judgment, and misstates the date on which it was rendered, is insufficient.—BECK v. THOMPSON, Oreg., 57 Pac. Rep. 419.

62. LIMITATIONS—Acknowledgment.—A letter written by one indebted on notes to his creditor at a time when the notes were not outlawed, acknowledging the indebtedness, and promising "that every cent I owe you will be paid," prevents the running of the statute for six years.—RUMSEY v. SETTLE'S ESTATE, Mich., 79 N. W. Rep. 579.

63. LIMITATIONS—Amendment. — Where action was against a corporation by its corporate name, the petition stating it was an "organization," and not alleging it to be a partnership, the allegation of incorporation could be added by amendment, without making it a new proceeding.—NELSON v. BRENHAM COMPRESS OIL & MFG. CO., Tex., 51 S. W. Rep. 514.

64. LIMITATIONS—Judgment.—Issuance of a writ of garnishment by a judgment creditor is not equivalent to an execution, so as to prevent the judgment being barred by limitations.—SHIELDS v. STARK, Tex., 51 S. W. Rep. 540.

65. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, defendants are not liable, no matter how vindictive they may have acted, nor what their motives may have been, if they acted with probable cause.—STAUNTON v. GOSHORN, U. S. C. C. of App., Fourth Circuit, 94 Fed. Rep. 52.

66. MANDAMUS—Jurisdiction—State Officers.—Const. art. 4, § 1, prohibiting any one department of the State government from exercising any of the powers belonging to the other, does not prevent the courts from controlling by *mandamus* the exercise by the State executive of a purely ministerial duty.—STATE v. SMITH, Mont., 57 Pac. Rep. 449.

67. MARRIAGE—Breach of Marriage Promise.—Where the defense, in an action for breach of marriage promise, was that plaintiff had voluntarily discharged defendant from his promise, and had given back to him their engagement ring, declarations of plaintiff, subsequent to the return of the ring, as to her purpose in returning it, were not admissible as a part of the *res gestæ*.—HEFT v. MASDEN, Ky., 51 S. W. Rep. 574.

68. MARRIAGE—Breach of Marriage Promise—Minors—A claim for damages cannot be based on the refusal of a female minor 18 years of age to perform a marriage contract, though Rev. St. art. 2957, provides that a female of such age may contract for marriage without her parents' consent, since the statute does not af-

fect the rule that a minor is not bound by an executory contract.—WELLS v. HARDY, Tex., 51 S. W. Rep. 503.

69. MARRIED WOMEN—Restriction on Power to Anticipate Income.—Where a provision of a will that a married woman to whom the income from a trust fund was bequeathed for life should have no power to alienate or anticipate such income was valid under the laws of the State where the will was probated and the trust estate existed, though it was only so valid because of an exception to the general rule in favor of married women, a note made by the woman while still under coverture cannot be given effect as an anticipation and enforced against such income by a court of equity, on the ground that the note constituted a valid obligation under the laws of another State in which it was made, and might there have been so enforced, and that it had been reduced to judgment in the courts of a third State, nor because the defendant, after the giving of the note, became, and still remains, a *feme sole*, nor even because of a subsequent change in the laws governing the trust, not in terms made retroactive.—HUNTER v. CONRAD, U. S. C. C., D. (R. I.), 94 Fed. Rep. 11.

70. MASTER AND SERVANT—Assumption of Risk—Promise to Repair Defects.—A master is liable for an injury to a servant, resulting from an obvious defect and known danger, where the servant relied on an express or implied promise by the master to make repairs, for such time as would be reasonably required to repair the defect, but no longer; and, in the event of an injury during such time, the servant could recover therefor.—DETROIT CRUDE OIL CO. v. GRABLE, U. S. C. C. of App., Sixth Circuit, 94 Fed. Rep. 73.

71. MASTER AND SERVANT—Derailment of Train—Assumption of Risk.—It is the duty of the party controlling a railroad train to advise himself, before it starts, not only as to one part of the existing situation, but of the whole, and govern himself accordingly.—WILSON v. LOUISIANA & N. W. R. CO., La., 25 South. Rep. 961.

72. MECHANICS' LIENS—Corporations—Acts of Directors.—Individual directors, or a majority, however great, of stockholders acting separately, cannot bind a corporation to pay for an improvement on its land, but such action must be taken as a body at a properly constituted meeting.—NICHOLSTONE CITY CO. v. SMALLEY, Tex., 51 S. W. Rep. 527.

73. MECHANICS' LIENS—Notice of Claim.—The requirement of the statute that notice of a claim for a lien shall be served on the owner of the building or his agent is complied with by service on a member of a church building committee of an unincorporated society.—PADGITT v. DALLAS BRICK & CONSTRUCTION CO., Tex., 51 S. W. Rep. 529.

74. MORTGAGE—Acknowledgment.—Public policy requires a certificate of acknowledgment, if in proper form, to prevail over the unsupported evidence of the grantor, and especially is that true where the grantor admits that she signed the instrument to which such certificate belongs.—GRAY v. LAW, Idaho, 57 Pac. Rep. 435.

75. MORTGAGES—Equitable Assignment—Foreclosure.—Where the payee of three notes secured by mortgage assigns one, and on payment of the two others by the mortgagor, with knowledge of the assignment, cancels the mortgage, the assignee cannot sue him as for money had and received; such cancellation not affecting the assignee's right to foreclose the mortgage to pay his note.—BREWER v. ATKEISON, Ala., 25 South. Rep. 992.

76. MORTGAGES—Foreclosure—Parties.—Where foreclosure is sought by sale of the mortgaged premises, and the application of the proceeds to the debt secured, and it is not shown by the bill that the estate of the deceased mortgagor is not liable upon the bond so secured for any balance which the land may be insufficient to pay, or that such balance could not for any reason be collected from the assets of the estate, the personal representative of the estate is a necessary party.—ESLAVA v. NEW YORK NATIONAL BUILDING & LOAN ASSN., Ala., 25 South. Rep. 1013.

77. MORTGAGES—Foreclosure—Redemption.—A junior mortgagee joining in foreclosure of the senior mortgage, and asking by cross complaint for foreclosure of his mortgage and sale of the premises, cannot redeem from the sale.—SAN JOSE WATER CO. v. LYNDON, Cal., 57 Pac. Rep. 481.

78. MORTGAGES — Foreclosure — Sale.—A sale by a trustee, at the request of the maker, of a deed of trust after the debt secured by it has been paid, simply as a means of conveying the title to a creditor in payment of a debt in preference to other creditors, who do not complain, passes the legal title.—MONTAGUE COUNTY v. MEADOWS, Tex., 51 S. W. Rep. 556.

79. MORTGAGES — Subrogation — Revival of Lien.—Where a fund equitably belonging to complainant is used to discharge a mortgage, equity will revive the lien, and subrogate complainant to the rights of the original mortgagee, though the property be a homestead.—MARKILLIE v. ALLEN, Mich., 79 N. W. Rep. 568.

80. MORTGAGE FORECLOSURE—Appointment of Receiver.—A receiver will not be appointed on foreclosure when the debtor is insolvent merely because the property at some future time may become insufficient to pay the mortgage debt.—LAUNE v. HAUSER, Neb., 79 N. W. Rep. 555.

81. MORTGAGE FORECLOSURE—Right to Redeem.—A party having an equitable mortgage, in the form of an absolute conveyance or transfer of the land, may redeem as "a creditor having a lien," without having first obtained a judicial determination that the conveyance or transfer is a mortgage.—SCHEIBEL v. ANDERSON, Minn., 79 N. W. Rep. 594.

82. MUNICIPAL CORPORATIONS — Action — Notice of Claim.—It is a sufficient service of the notice required by Laws 1897, ch. 248, to be given to the common council or other governing body of a municipality as a condition precedent to the bringing of an action against it for injuries sustained by its negligence, if the notice is directed to such council, and delivered, for filing, to the recorder or other officer having the custody of the records and files of the council, within the time limited by the statute.—ROBERTS v. VILLAGE OF ST. JAMES, Minn., 79 N. W. Rep. 519.

83. MUNICIPAL CORPORATIONS—Defective Sidewalk—Negligence.—One who had in mind the bad condition of the crosswalk leading from the street curb to the sidewalk, and knew that if she went over it she must exercise a great deal of care, and take the chances of going in safety, and by stepping aside a few feet could have passed along without going over the walk, is barred by contributory negligence from recovering for injury received in crossing it.—IRION v. CITY OF SAGINAW, Mich., 79 N. W. Rep. 572.

84. MUNICIPAL CORPORATIONS—Implied Powers—Sale of Bonds.—Express authority of a village to borrow money, and issue bonds therefor, includes implied authority to employ a person to procure a purchaser for the bonds, whether he be a broker or not.—ARMSTRONG v. VILLAGE OF FT. EDWARD, N. Y., 53 N. E. Rep. 1116.

85. MUNICIPAL CORPORATIONS—Treasurer—Bond.—In an action on a city treasurer's bond, a special finding by the jury as to how much money was in the hands of such treasurer belonging to the city at the close of his term of office is to be construed as meaning the amount of the city's money he then had, without reference to what he owed the city.—FOSTER v. STATE, Ind., 53 N. E. Rep. 1095.

86. NATIONAL BANKS — Usury — Penalty.—Where a national bank has received a greater rate of interest than is allowed by law, the amount of recovery, under Rev. St. U. S. § 5198, by the party who has paid the same, is twice the amount of all the interest paid, and not merely double the excess over the legal rate.—WATT v. FIRST NAT. BANK OF LAKE BENTON, MINN., Minn., 79 N. W. Rep. 509.

87. NEGLIGENCE—Risks — Voluntarily Assumed.—An employee, of age, and not shown to be below the average of mental capacity and intelligence, is presumed

to observe and appreciate the dangers obviously incident to the operation of exposed, unguarded machinery.—JONES v. MANUFACTURING & INVESTMENT CO., Me., 43 Atl. Rep. 512.

88. NEGLIGENCE—Runaway Team. — The fact itself that a team is found running away upon the streets of a city without a driver requires explanation as to how and why this should have been, and if the driver is not produced as a witness, or his absence accounted for, it is fair to presume that no satisfactory explanation could have been given.—MAUS v. BRODERICK, La., 25 South. Rep. 977.

89. PARTNERSHIP—Dissolution—Powers of Partner.—It is the duty of a partner, in charge of a valuable partnership asset, when dissolution is sued for, to preserve it, to prevent its deterioration or destruction, and in this behalf he may make reasonable expenditures on behalf of the partnership.—BAGNETTO v. BAGNETTO, La., 25 South. Rep. 987.

90. PARTNERSHIP — What Constitutes. — Where one furnishes another with property to use in carrying on a business, stipulating for a share of the profits as compensation, it makes him a partner in the business. —FOUKE v. BRENGLE, Tex., 51 S. W. Rep. 519.

91. PLEADING—Amendment.—In an equitable action originally brought for the sole purpose of foreclosing a seed lien upon a crop of wheat raised by the defendant Wormington, the trial court, at the close of the evidence, and against the objection of counsel, permitted the plaintiff to file an amended complaint, in which it was alleged, as a second and new cause of action, that the defendants, acting jointly, had unlawfully converted the grain upon which the plaintiff claimed to have a seed lien, and asked for a money judgment for damages for such alleged conversion. Held, that the amendment was improperly allowed, and was prejudicial error.—MARES v. WORMINGTON, N. Dak., 79 N. W. Rep. 441.

92. PLEADING—Breach of Contract.—A plaintiff cannot recover under a complaint which alleges that defendant employed him to do certain work, the alleged value of which he seeks to recover, where the evidence shows that the work was done by him pursuant to an agreement to farm defendant's land on shares, and that defendant, after he had performed the work, refused to carry out the agreement.—CULL v. SAN FRANCISCO & FRESNO LAND CO., Cal., 57 Pac. Rep. 456.

93. PRINCIPAL AND AGENT—Authority of Agent.—An agent authorized to loan money upon coupon notes and mortgage security, which are returned to and retained by the principal, has no implied authority to collect the same, without having lawful possession of such coupon notes and mortgage; and, when he has such possession, he has no implied authority to collect them before due.—SCHENK v. DEXTER, Minn., 79 N. W. Rep. 526.

94. PRINCIPAL AND AGENT—Evidence — Authority.—Where a debtor gives an order for an amount due him, payable to an agent of the creditor, evidence of the circumstances of the transaction and the conversation of the parties is admissible to show that he intended to transfer the amount of the order to his creditor.—RUTHVEN v. CLARKE, Iowa, 79 N. W. Rep. 454.

95. PRINCIPAL AND AGENT—Factor—Negligence.—A factor is bound to possess a reasonable degree of skill and knowledge, and to exercise that skill and knowledge with reasonable care and prudence. He undertakes for that degree which an ordinarily discreet, prudent and diligent man would exercise in his own business, under the circumstances. If he exercises less than that degree of skill and knowledge, and loss ensues, he is liable therefor. If, for example, he delays a sale of goods consigned to him for an unreasonable length of time, and the goods depreciate in value, so that his principal loses, he is liable for such loss.—ROBERTS v. COBB, Minn., 79 N. W. Rep. 510.

96. PRINCIPAL AND SURETY—Contribution.—A judgment against a principal and sureties was paid by one of the sureties, who took an assignment of it to compel contribution from his co-sureties. Thereafter the judgment was, at the request of the paying surety, satisfied of record to relieve the real estate of the paying surety from the lien. It was intended to have it satisfied only as to the paying surety. Held, that as to a co-surety who paid no consideration for it, such satisfaction did not release his liability to contribute. —MERCHANTS' NAT. BANK OF GREAT FALLS v. GREAT FALLS OPERA HOUSE CO., Mont., 57 Pac. Rep. 445.

97. PRINCIPAL AND SURETY—Contribution.—The right of a surety, who has paid a judgment against his principal, and himself and other sureties, to enforce contribution from a co-surety, under Code Civ. Proc. § 1242, which provides that a surety paying a judgment against his principal and himself and other sureties shall be entitled to the benefit of the judgment, to enforce contribution or repayment, if within 10 days after payment he shall file with the clerk of the court where the judgment was rendered notice of his payment, and claim for contribution, is not barred by the lapse of 3 years after the payment of a judgment, but exists so long as the judgment is alive.—NORTHWESTERN NAT. BANK OF GREAT FALLS v. GREAT FALLS OPERA HOUSE CO., Mont., 57 Pac. Rep. 440.

98. PUBLIC LANDS—Lakes — Swamps. — The United States government never had control or ownership of the lake beds in a State, the title thereto being vested in the State. A United States survey, fixing land covered with water as being a lake, followed by a sale of adjacent land with reference to the survey, is not conclusive, precluding the land department from determining that the land is a swamp, if the purchasers of the adjacent land are not prejudiced.—KOOD v. WALLACE, Iowa, 79 N. W. Rep. 449.

99. RAILROAD COMPANY—Contributory Negligence.—One struck by a train at a crossing is not excused, because his attention was attracted to a train on another road, for not having looked for the train which struck him, it being in sight when he should have looked, or for going forward after having looked when it was in sight.—MUSCARRO v. NEW YORK CENT. & H. R. R. CO., Penn., 43 Atl. Rep. 527.

100. RAILROAD COMPANY — Negligence — Proximate Cause.—Where a child lying in a cradle in its parents' home is injured by fire escaping from a locomotive, which is negligently operated and defectively constructed, such negligence is the proximate cause of the injury.—GULF, C. & S. F. RY. CO. v. JOHNSON, Tex., 51 S. W. Rep. 531.

101. RECEIVERS—Powers and Duties.—A receiver of a telegraph line will, in the absence of plea or proof of limitations of authority, be presumed to have authority to contract to transmit a message beyond his line, or, at least, that it is his duty to transmit it with dispatch to the end of his line, and there deliver it for transmission to the connecting line.—JONES v. ROACH, Tex., 51 S. W. Rep. 549.

102. REFORMATION OF INSTRUMENTS—Lost Deeds.—In a suit for specific performance of a land contract, involving the reformation of the description in a lost deed, its contents cannot be shown by declarations of the grantor made after execution, as to what land he had conveyed.—NICHOLSON v. TARPEY, Cal., 57 Pac. Rep. 457.

103. REMOVAL OF CAUSES—Time for Filing Petition.—Where a defendant in a State court, a corporation of another State, appeared specially, and moved to quash the sheriff's return of service, and on the overruling of its motion, reserved a bill of exceptions, and in its answer and at all times thereafter insisted on its objection to the jurisdiction of the court over it, the fact that it answered to the merits, and took other action, by motion and otherwise, in preparation for trial, did not constitute such a voluntary appearance as would debar it from exercising its right to remove the cause to a federal court, when, on its subsequent motion, the order overruling its objection to the service was

set aside, leaving the question whether it could legally be required to answer still pending.—DONAHUE v. CALUMET FIRE-CLAY CO., U. S. C. C., D. (Ky.), 94 Fed. Rep. 23.

104. SHERIFFS—Failure to Protect Prisoner—Liability on Official Bond.—The duty of a sheriff to safely keep a prisoner charged with an offense, and committed to his charge, and to produce such prisoner in court at the time of trial, is one that he owes to the State alone, and for a breach of which no action lies in behalf of any citizen; but, in addition, it is his duty to exercise reasonable care for the protection of the life and health of any person lawfully placed in his custody as an official, and this duty he owes to such person, and he and his sureties are liable on his official bond for its breach, where such bond is conditioned generally for the faithful performance of the duties of his office.—STATE v. GOBIN, U. S. C. C., D. (Ind.), 94 Fed. Rep. 48.

105. SLANDER—Malice.—Where the words are actionable *per se*, defendant is not entitled to an instruction directing the jury to find for him unless they believe the words were spoken maliciously, as the law imputes malice.—JONES v. TODD, Ky., 51 S. W. Rep. 452.

106. SLANDER—Privilege.—A complaint for slander, alleging merely that plaintiff is a Catholic priest and defendant a Catholic archbishop, does not show that plaintiff is under the jurisdiction of defendant, so as to be subject to removal by him under the rules of the church, thus making remarks by defendant as to his removal privileged.—HELLSTERN v. KATZER, Wis., 79 N. W. Rep. 429.

107. STATUTES—Re-enactment—Effect.—The re-enactment of a statute authorizing the passage of an ordinance providing for the determination of an election contest does not abrogate such an ordinance passed in pursuance of the earlier statute.—CARNEY v. NEELEY, Kan., 57 Pac. Rep. 527.

108. TAXES—Voluntary Payment.—Payment is voluntary, and therefore not recoverable, where the owners of the property appeared at tax sale, and without protest took part therein, and bid off the property, and though, not having the money with them to make payment, induced the treasurer to let their bid stand on representation that, if he would go to their office, the amount of the bid would be paid him, though, on his arrival, they insisted on the receipt reciting that the payment was under protest.—H. M. LOUD & SONS LUMBER CO. v. VIENNA TP., Mich., 79 N. W. Rep. 575.

109. TAXATION OF NON-RESIDENTS.—Taxes imposed on a non-resident, whose property is not in the State, is null, as tax laws can have no extraterritorial effect.—LIVERPOOL & L. & G. INS. CO. v. BOARD OF ASSESSORS, La., 25 South. Rep. 970.

110. TAX SALE—Irregularities—Tender to Purchaser.—Mere irregularities in conducting a sale of real estate for delinquent taxes legally assessed will not defeat the lien of the purchaser at such sale.—SANFORD v. MOORE, Neb., 79 N. W. Rep. 548.

111. TRESPASS—Possession.—Where one claiming title to land had occupied it as a cropper under another, who had theretofore been in quiet possession, and after removal of the crops the cropper had done nothing more with it, except to run a survey over it, until he undertook to assert possession by plowing the ground after another tenant had taken possession and put in a crop, he had no such possession as would entitle him to maintain trespass against the other tenant.—DONALDSON v. CRANE, Mich., 79 N. W. Rep. 569.

112. TRUST—Deposit by Agent—Lien of Bank.—When an agent, rightfully in possession of his principal's money, deposits it in a bank of which he is president to his own credit and as a part of his general deposit account, and tells the cashier the name of the person to whom it belongs, and instructs him to remit it to the owner, but the remittance is not made, and the agent in a short time checks against the general balance of the account, inclusive of the deposit in question, reducing it far below the amount of such deposit, the bank has the right to presume that the agent knows the remittance has not been made and has revoked the order to make it, and that the checking out of the deposit by the agent is within the authorized terms of his agency; and in such case the bank will not be charged with notice of a trust in favor of the owner of the money to the extent of the deposit made by the agent.—FIRST NAT. BANK OF SHARON, PA., v. VALLEY STATE BANK OF HUTCHINSON, Kan., 57 Pac. Rep. 510.

113. TRUST—Parol Evidence.—One who takes title to real estate purchased with funds of another, and for the benefit of the latter, holds as trustee, and parol evidence is admissible to establish such trust.—BRANSTETTER v. MANN, Idaho, 57 Pac. Rep. 433.

114. TRUST AND TRUSTEE—Estoppel.—A trustee is estopped from denying the title or estate of the person for whose benefit it was created, and for whose use he holds it.—STERLING v. STERLING, Minn., 79 N. W. Rep. 525.

115. VENDOR AND PURCHASER—Notice of Occupant's Title.—A purchaser having actual or constructive notice before payment of a third person's title is not a *bona fide* purchaser.—BEATTIE v. CREWDSON, Cal., 57 Pac. Rep. 463.

116. WILLS—Charging Legacies on Land.—A bill providing that testator's debts shall be paid out of his estate, and that a certain sum shall be spent for his monuments, and giving to his only heir his homestead and $20,000, and reciting, "After the above bequests and expenses are paid in full, I give and devise," following which are several general legacies, and then empowering his executors, if necessary to pay his debts, to sell his real estate, except the homestead, charges the legacies on the real estate except the homestead, as well as on the personalty.—SMITH v. CAIRNS, Tex., 51 S. W. Rep. 498.

117. WILLS—Fees Tail—Contingent Remainder.—A testator devised and bequeathed his realty and personalty to his grandson by name, and provided that at his death the proceeds should be paid to a religious organization, if he left no issue. Held, that this created an estate tail in the grandson, with contingent remainder to the society as to the realty, and an interest, by way of executory devise, in the personalty.—HORTON v. UPHAM, Conn., 43 Atl. Rep. 492.

118. WILLS—Life Estate with Power of Disposal.—A testator devised and bequeathed to his widow, for her life, all of his estate, after the payment of debts, funeral expenses and the charges of administration, with a power of disposal of the same as she might deem necessary, the remainder to his children and their heirs. She was also named as executrix of the will. This life estate with power of disposal was repeated afterwards, and expressly confirmed by a codicil of the testator.—SMALL v. THOMPSON, Me., 43 Atl. Rep. 509.

119. WILLS—Power.—A devise of land to one for life to be held by trustees, who are given power to dispose of it with the consent of the life tenant, vests merely a power, and not a title, in the trustee.—EDWARDS v. BENDER, Ala., 25 South. Rep. 1010.

120. WITNESSES—Wife—Criminal Prosecution.—Section 5662, Gen. St. 1894, to the effect that a husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent, but this prohibition does not apply to a criminal proceeding for a crime committed by one against the other, construed, and held, that a wife is not a competent witness for the State in a prosecution against her husband for a crime against her committed before their marriage.—STATE v. FREY, Minn., 79 N. W. Rep. 518.

121. WITNESSES—Transactions with Persons Since Deceased.—A debtor is not a competent witness for his creditor, who seeks to be substituted to his rights, as to a transaction with a person since deceased.—THOMAS v. PAYNE, Ky., 51 S. W. Rep. 450.